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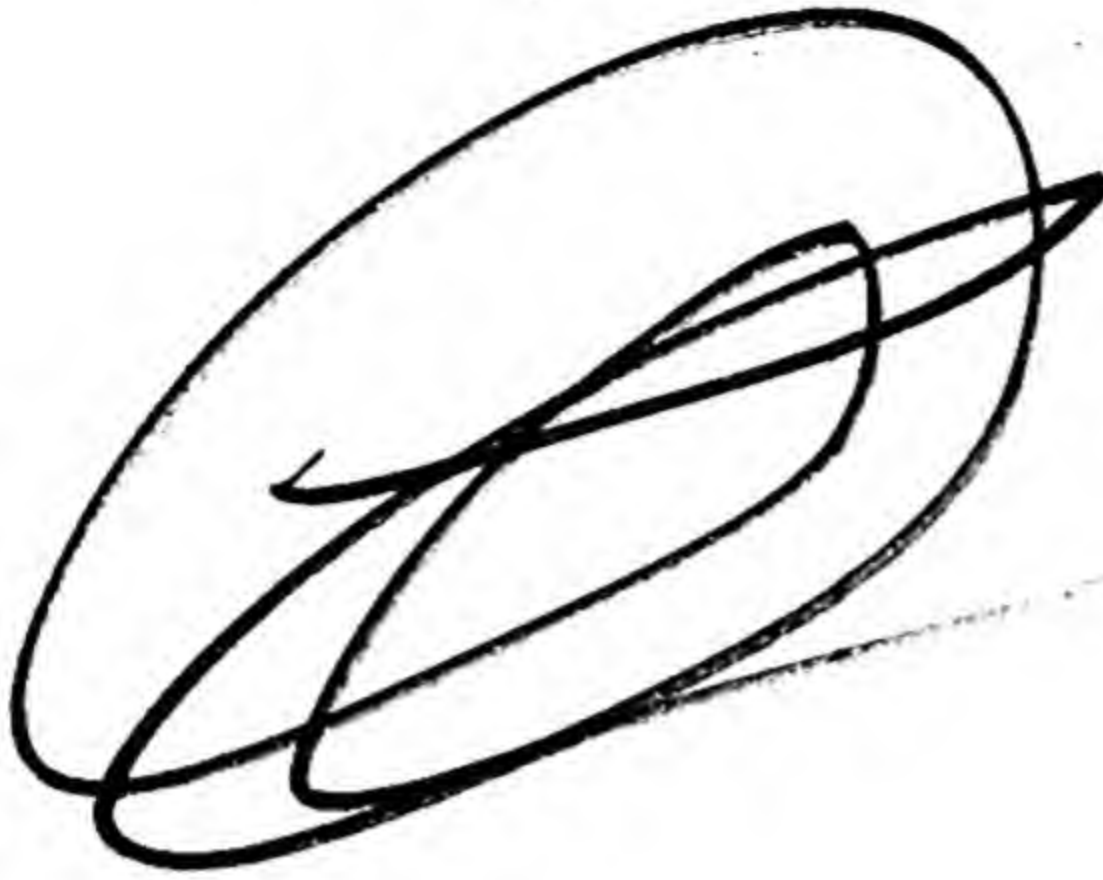
THE LAW
OF
EXECUTION OF DECREES
IN
BRITISH INDIA

Containing an exhaustive commentary with all important rulings reported in official and non-official journals in British India, an all-round complete law on the subject, additional rules made by all the High Courts, complete lists of Courts according to notifications under various sections of the C. P. Code relating to execution, etc., etc.

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PREFACE.

THE recent very large growth of the case-law on the Code of Civil Procedure in British India has rendered it rather inconvenient to deal fully with the subject within the bounds of a single volume of daily practical use. To meet this difficulty, the whole subject is to be split up into several parts and each part is to cover a whole volume complete in itself without the necessity of any reference to the other parts. Partly with this idea in view and partly owing to the vastness of the subjects contained in this book which is scattered here and there in the Code of Civil Procedure, an attempt has been made to fully analyse the subject and to give it in a complete but at the same time a concise form, for fear of increasing the bulk of the book; and it is hoped that this will become the first part of the commentary on the Code of Civil Procedure which will be followed by the publication of other parts to complete the whole subject of Civil Procedure. The law relating to the Execution of Decrees contained in the Civil Procedure Code, the Limitation Act, and other Acts relating to Court-fees, Stamps, etc., has been collected in this book and arranged in a manner which naturally comes to the mind of the reader. The whole of the case-law applicable to the subject contained in the official and non-official journals and reports in British India has been collected and arranged under appropriate headings. The changes in law have been clearly shown where necessary and case-law on the repealed provisions has been referred to, though it is purposely avoided to deal in detail with the repealed law. The cases reported in the official reports have been cited only with reference to those reports; but those reported in the non-official journals and periodicals are cited as far as possible with reference to two of the

journals and it is tried to give the reference to the pages of the Indian Cases and All India Reporter where available, to avoid the difficulty of finding the full report of a case reported in a local journal of another province, as these two All-India journals are subscribed throughout India.

The subject has been divided into chapters and headings and sub-headings in order to help easy reference. Special attention has been given to the subject of Sales in Execution, questions relating to Execution etc., of decrees, *res judicata*, and Limitation for Execution. The different views of the various High Courts have been compared and the rulings for and against on a point as well as the distinguishing facts in each case have been especially laid down.

The several notifications under various sections of the Civil Procedure Code relating to Execution and the complete lists of Courts thereunder are given in the six lists added in the Appendix. The latest additions of the important works on the subject have been consulted and my thanks are due to the learned authors of those works, some of which are, Mulla's Civil Procedure Code, Agarwala's Indian Practice, Rustomji's Limitation Act and Dr. Nand Lal's Civil Procedure Code.

It is hoped that this new treatment of the subject will be helpful to the Bench and the Bar.

JHELUM, }
26th October, 1926. }

S. R. SACHAR.

ABBREVIATIONS.

(A)	... All India Reporter, Allahabad.
A. or All.	... Indian Law Reports, Allahabad Series.
Agra	... Agra High Court Reports.
A.L.J.	... Allahabad Law Journal.
A.W.N.	... Allahabad Weekly Notes.
(B)	... All India Reporter, Bombay.
B. or Bom.	... Indian Law Reports, Bombay Series.
B.H.C.R.	... Bombay High Court Reports.
B.L.R.	... Bengal Law Reporter.
Bom. L.R.	... Bombay Law Reporter.
Bur. L.J.	... Burma Law Journal.
Bur. L.R.	... Burma Law Reports.
Bur. L.T.	... Burma Law Times.
(C)	... All India Reporter, Calcutta.
C. or Cal.	... Indian Law Reports, Calcutta Series.
C.L.J.	... Calcutta Law Journal.
C.L.R.	... Calcutta Law Reports.
C.P.L.R.	... Central Provinces Law Reports.
C.W.N.	... Calcutta Weekly Notes.
F.B.	... Full Bench.
I.A.	... Law Reports, Indian Appeals.
I.C.	... Indian Cases.
(L.) or (Lah.)	... All India Reporter, Lahore.
L. or Lah.	... Indian Law Reports, Lahore Series.
L.B.R.	... Lower Burma Rulings.
L.O.	... Lahore Cases.
L.L.J.	... Lahore Law Journal.
L.R.A.	... Law Reports, Allahabad.
L.T.	... Law Times.
L.W.	... Law Weekly.
(M)	... All India Reporter, Madras.
M. or Mad.	... Indian Law Reports, Madras Series.
M.H.C.R.	... Madras High Court Reports.
M.I.A.	... Moore's Indian Appeals.
M.L.J.	... Madras Law Journal.
M.L.T.	... Madras Law Times.
M.W.N.	... Madras Weekly Notes.
Mys. L.J.	... Mysore Law Journal.
N.L.J.	... Nagpur Law Journal.
N.L.R.	... Nagpur Law Reports.
N.W.P.H.C.R.	... North Western Provinces High Court Reports.
(O)	... All India Reporter, Oudh.
O. & A.L.R.	... Oudh and Agra Law Reporter.
O.O.	... Oudh Cases.
O.L.J.	... Oudh Law Journal.
O.W.N.	... Oudh Weekly Notes.
P.	... Indian Law Reports, Patna Series.

(P)	... All India Reporter, Patna.
(P.O.)	... All India Reporter, Privy Council.
P.O.	... Privy Council.
Pat.	... Calcutta Weekly Notes (Patna Supplement).
Pat. L.R.	... Patna Law Reporter.
Pat. L.T.	... Patna Law Times.
P.J.	... Printed Judgments, Bombay High Court.
P.L.J.	... Patna Law Journal.
P.L.R.	... Punjab Law Reporter.
P.W.R.	... Punjab Weekly Reporter.
Q.B.	... Queen's Bench Reports.
(R)	... All India Reporter, Rangoon.
R.	... Indian Law Reports, Rangoon Series.
(S)	... All India Reporter, Sind.
S.L.R.	... Sind Law Reporter.
U.B.R.	... Upper Burma Rulings.
U.P.L.R.	... United Provinces Law Reporter.
W.N.	... Weekly Notes, Law Reports.
W.R.	... Weekly Reporter.

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THE LAW
OF
EXECUTION OF DECREES
IN BRITISH INDIA

CHAPTER I

WHAT DECREES MAY BE EXECUTED

DECREES OF COURTS IN BRITISH INDIA.—The Code of Civil Procedure, 1908, is an Act to consolidate and amend the laws relating to the Procedure of the Courts of Civil Judicature. The part of the Code relating to execution extends to the whole of British India except the Scheduled Districts. As to the application of the Code to the Scheduled Districts, see *infra*.

PREAMBLE OF THE C. P. CODE, 1908.—“An act to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature.”

S. 1 (3).—This section extends to the whole of British India. The rest of the Code extends to the whole of British India except the Scheduled Districts.

“BRITISH INDIA” means all territories and places within His Majesty’s dominions which are for the time being governed by His Majesty through the Governor General of India or through any Governor or other officer subordinate to the Governor General of India. [General Clauses Act, X of 1897, S. 3 (17).]

These words do not include the territories of Native States and Princes and States in alliance with His Majesty. 191 P.R. 1888. [See “Foreign Court,” *infra*]. Aden, the Laccadive Islands, the Andaman and Nicobar Islands and Ajmere and Marwara in the Centre of Rajputana are declared to be parts of British India by Acts XIV and XV of 1874. 9 B. 244. Singapore is not in British India. [Straits Settlements Act, 1866, S. 1.] British Burma is in British India. 13 O. 221. The land assigned for the

purpose of establishing a Civil Station in a Native State is not a part of British India. 14 Bom. L.R. 876. The Civil Station at Wadhan is not a part of British India. 14 Bom. L.R. 877 (dissenting from 9 B. 244). The Civil Station at Rajkote is not in British India. 10 B. 186. The Province of Kathiawar is not wholly British Indian territory. 33 O. 219. Any newly acquired province becomes on its annexation a part of British India. 1 Boulnois 161. The British Cantonment of Secunderabad is not a part of British India. 21 O. 177.

DECREES OF COURTS IN SCHEDULED DISTRICTS.—Schedule I to the Scheduled Districts Act, XIV of 1874, contains a list of Scheduled Districts. (See List A.) As above stated the provisions of the C. P. Code did not extend to any of these Districts. But S. 5 of the above Act empowers the Local Government with the previous sanction of the Governor General in Council to extend to any of these Districts any enactments in force in British India; and the whole of the C. P. Code has accordingly been extended to several Scheduled Districts. (For a list of such Districts, see List B.) Therefore it follows that the Courts in the Scheduled Districts given in the list B may execute their decrees according to the law laid down in the C. P. Code. S. 43, C. P. Code, provides for the execution of decrees passed by Courts of the Scheduled Districts by Courts in British India to which the provisions relating to execution do not extend (e.g., the Courts in the Scheduled Districts). 15 O. 365.

S. 43.—Any decree passed by a Civil Court established in any part of British India to which the provisions relating to execution do not extend,...may, if it cannot be executed within the jurisdiction of the Court by which it was passed, be executed in manner herein provided within the jurisdiction of any Court in British India.

The whole of C.P. Code applies to Berar so far as it may be applicable without any distinction as to power of revision. 6 I.C. 429=6 N.L.R. 49. The notification extending the provisions of the C.P. Code to Jalpaiguri did not apply to the Bhutan Duars as Act XVI of 1869 expressly excluded it. But after the repeal of this Act by Act VII of 1895, the C.P. Code applies in the territory of Bhutan Duars. 4 O.W.N. 287. The words "established in any part of British India to which the provisions relating to execution do not extend" are added in section 43 to make it applicable to decrees passed by the courts in the Scheduled Districts.

DECREES OF FOREIGN COURTS.—"Foreign Court" means a court which has no authority in British India and is not established or continued by the Governor General in Council. [S. 2 (5)].

The two essentials are that (1) the courts must be situate beyond the limits of British India, and (2) the courts must have no authority in British India or must not be established or continued by the Governor General in Council. The Privy Council is not a foreign court. Though it is situate beyond the limits of British India, it is invested with judicial authority within British India. 8 B. 571. [vide Report with Bill IV of Act X of 1877]. Any other court in England is a foreign court. 8 B. 571. 8 B.H.C. O.O. 200; 28 O. 641; 31 O. 274. Courts in Scotland and the Colonies are foreign

Courts. 6 O.W.N. 829. Courts in the Scheduled Districts are not foreign courts. Courts in Native States are foreign courts. 14 M.L.T. 96; 191 P.R. 1888; 7 M. 164; 22 B. 86; 22 O. 222 P.C.; (1913) M.W.N. 605. A court in the Faridkot State is a foreign court. 191 P.R. 1888; 112 P.R. 1894; 66 P.R. 1889; 22 O. 222 P.C. A court in Ceylon is a foreign court. 32 M. 469 20 M. 112. A court in the Province of Mysore is a foreign court. The Supreme Court of Mauritius is a foreign court. 29 O. 509. The tributary Mahals of Orissa do not form part of British India. 29 O. 400. The court of Dewan Ahilkar in Cooh Behar is not in British India. 13 W.R. 154. French courts in India are foreign courts. 4 W.R. 108; 15 W.R. 500; 8 M.H.O. 14 7 M. 105; 6 B. 292; 2 M. 337; 2 M. 400. Courts established or continued by the Governor General in Council are not foreign courts. [For a list of such courts, see Appendix.] Courts in Presidency Bazaars and British Cantonments in Native States are not foreign courts; these courts are established by the Governor General in Council. Foreign courts may be divided into two classes, (1) those situate in the territories of any Native Prince or State in alliance with His Majesty with respect to which a notification is issued under S. 44, C.P. Code; and (2) any other foreign court. The decrees of courts mentioned in (2) above cannot be executed at all by courts in British India. A foreign judgment as such has no force in British India. It may form the basis of a suit in a British Indian Court subject to the provisions of Ss. 13 and 14 of the C.P. Code. 20 O.W.N. 1213 P.C. [See *infra*]. The decrees of courts mentioned in (1) above may be executed in British India subject to the provisions of S. 44, C.P. Code which runs thus—

The Governor General in Council may, by notification in the Gazette of India declare that the decrees of any civil or revenue courts situate in the territories of any Native Prince or State in alliance with His Majesty and not established or continued by the authority of the Governor General in Council, or any class of such decrees may be executed in British India as if they had been passed by the courts in British India.

NOTIFICATIONS.—Accordingly notifications have been issued under this section and the list of such States is noted down in List C.

RESTRICTIONS ON THE EXECUTION OF SUCH DECREES.—The expression "as if they had been passed by the courts of British India" relates only to the mode of execution and has not the effect of giving foreign judgments, all the incidents of a judgment of a British Court. 37 M.L.J. 535. An application under S. 44, C.P. Code, for the execution of a decree may be resisted on any of the grounds mentioned in S. 13 of the Code. 39 M. 733; 15 B. 216; 16 M.L.T. 474; 40 B. 551. It is quite competent to a British Indian Court executing a decree passed by a court in a favoured Native State (that is one in respect of which a notification pursuant to S. 44, C.P. Code, has been issued) to go behind the decree and to enquire into the question whether the court which passed the decree had jurisdiction to do so, as a British court ought not to execute the decree if passed without jurisdiction. 39 M. 24 F.B.; 40 B. 551; 15 B. 216; 89 I.C. 347 = 41 O.L.J. 508. For restrictions placed on such decrees, see sections 13 and 14, C.P. Code, *infra*.

DISCRETIONARY POWER OF COURT.—S. 44 leaves a discretionary power to the court to execute the decree or refuse its execution. 20 I.C. 704 = (1913) M.W.N. 605.

(14 C. 546, a case in which the copy of the record was not signed by the judge but by the Sarishtadar). 39 M. 24 ; 15 B. 216 ; 82 I.O. 492 (M).

SIMULTANEOUS DECREES IN BRITISH INDIA AND IN FOREIGN TERRITORY.—The existence of a decree in Foreign territory is no bar to the execution of a decree of a court in British India, though the latter formed the cause of action for the former. 7 C. 82.

MODES OF ENFORCEMENT OF SUCH DECREES.—(i) An application for execution lies in respect of such judgments obtained in the favoured Native States under S. 44, O.P. Code, as above described.

(ii) A suit may be brought upon such foreign judgments and decrees obtained therein under the conditions mentioned in Ss. 13 and 14 O.P. Code. 22 C. 222 P.O. ; 15 W. R. 500 ; 3 B. 193 ; 191 P. R. 1888 ; 4 W.R. 107 ; 27 M.L.J. 595 ; 7 M. 164 ; 24 B. 86 ; 7 M. 105 ; 1890, A.W.N. 148 ; 2 M. 337 (*contra* was held in 6 B. 292, which is dissented from in P.O. and other rulings). 13 C. 55, holding that a British Court is not competent to execute a decree transferred to it by any Court in a Native State out of British India is not therefore good law taken generally with respect to all Native States. Under the old Code there was a distinction between the Asiatic and African Courts on the one side and other foreign courts on the other, which has been removed by the present O.P. Code. See S. 13, Legal Changes. Therefore when a suit is instituted in British India on the judgment of the court of a Native State, the British Court is precluded from enquiring into the case except as provided by the several clauses of S. 13, O.P. Code. 13 P.W.R. 1916. Where a suit is brought on a foreign judgment and the latter is not on the merits the plaintiff must prove his case apart from the judgment sued upon. 14 P.R. 1919.

LIMITATION FOR THE SUIT.—The period of limitation for a suit on a foreign judgment is six years from the date of the judgment under S. 117 of the Indian Limitation Act. 4 W.R. 107 ; 8 W.R. 32.

LIMITATION FOR EXECUTION OF FOREIGN DECREES.—The law of limitation applicable to a decree of a foreign state is the law which would apply if the decree had been passed in a Court in British India. 14 C. 570 ; 10 B. 504.

NOTICE TO THE JUDGMENT DEBTOR.—When an application is made to execute a decree of a foreign court, notice ought to be issued by the executing court to the judgment-debtor to appear and state his objections if any to execution. 86 I. O. 492 = 1925 M. 788.

REGISTRAR OF THE SMALL CAUSE COURT.—A Judge of a Presidency Small Cause Court has power to execute the decree of a foreign court transferred to it under S. 44 but the Registrar of the said court has no jurisdiction under S. 13 or 35 of the Presidency Small Cause Courts Act to issue process in execution of a foreign decree. 40 I. O. 570 = (1917) M. W. N. 498.

S. 13.—A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except—

(a) where it has not been pronounced by a Court of competent jurisdiction ;

- (b) where it has not been given on the merits of the case ;
- (c) where it appears on the face of the proceedings to be founded on an incorrect view of international law, or a refusal to recognise the law in British India in cases in which such law is applicable ;
- (d) where the proceedings in which the judgment was obtained are opposed to natural justice ;
- (e) where it has been obtained by fraud ;
- (f) where it sustains a claim founded on a breach of any law in force in British India.

LEGAL CHANGES :—The corresponding S. 14 of the old Code of 1882 ran as follows :—

No foreign judgment shall operate as a bar to a suit in British India—

- (a) if it has not been given on the merits of the case ;
- (b) if it appears on the face of the proceedings to be founded on an incorrect view of international law or of any law in force in British India ;
- (c) if it is, in the opinion of the court before which it is produced, contrary to natural justice ;
- (d) if it has been obtained by fraud ;
- (e) if it sustains a claim founded on a breach of any law in force in British India.

Where a suit is instituted in British India on the judgment of any foreign court in Asia or Africa except a Court of Record established by Letters Patent of Her Majesty or any predecessor of Her Majesty or a supreme consular court established by an order of Her Majesty in Council, the court in which the suit is instituted shall not be precluded from inquiry into merits of the case in which the judgment was passed.

1. Clause (a) is new.
2. The last paragraph of the old section in the Code of 1882 has been omitted, thus removing the distinction in the case of all Asiatic Courts.

SCOPE.—The principle upon which actions on foreign judgments rest is that the judgment of a court of competent jurisdiction imposes a duty on the defendant to abide by it (see 13 M. 496 ; 20 M. 112) also 6 B. 292. The courts of British India are guided by the same principles as are adopted by the courts of England, in considering the effect of foreign judgments. 20 M. 112 ; 6 M. 273. A foreign judgment is conclusive as to the matter thereby adjudicated upon except as provided in this section. 9 Bur. L.T. 106 ; 2 L. 207.

FOREIGN JUDGMENT.—Foreign “ judgment ” means the judgment of a foreign court [S. 2 (6).]

For the definition of "foreign court" see *supra*.—An act of State cannot be regarded as analogous to a foreign judgment. 17 B. 620.

Shall be conclusive.—A judgment of a foreign court shall be conclusive unless the decision is inoperative by reason of one or more of the circumstances mentioned in the section. If a suit is dismissed by a foreign court, a second suit will fail in a British Indian Court on the original cause of action if the conditions specified in S. 13 are fulfilled. 13 B. 224; 8 B.H.C. O.C. 200; 9 B. 346.

ENQUIRY BY THE EXECUTING COURT.—A British Court executing a foreign decree has power to enquire whether the foreign court has jurisdiction to pass the decree. 102 P. R. 1892; 18 Bom. L.R. 486; 2 M. 337; 21 A. 17; 66 P.R. 1889; 24 B. 86. The judgment of a foreign court can be *prima facie* evidence of jurisdiction. 28 C. 641.

CL. (A) Submission to jurisdiction.—The question whether a submission to jurisdiction is voluntary or under duress is one of fact in each case. If the submission is for saving property it is not voluntary even though a written statement is filed objecting to the jurisdiction and raising a defence on merits. 27 M.L.J. 535—16 M. L. T. 479; 37 M. 163; 39 M. 24 F.B. See 16 Bom. L.R. 620 (*contra* 2 M. 407). A Foreign judgment in a case in which the defendant appears and defends the suit is effective and within jurisdiction even though the court had no jurisdiction over the defendant. 99 M. 733; 2 M. 400; 8 M.H.C.R. 14; 139 B. 34; 2 M. 407. But if the defendant protests against the jurisdiction and then proceeds to defend the suit the judgment is a nullity. 2 M. 407. The protest against the jurisdiction must be made at an early stage, otherwise it would amount to submission. 7 M. 105. A defendant engaging in a suit a pleader to defend the case who has no instructions from his client in the case is not said to have submitted himself to the jurisdiction of the court. 18 M. 327. An objection taken in the foreign court of first instance as to the jurisdiction of the court, but not persisted in the appellate court amounts to submission to foreign court. 29 I. C. 456. A defendant must be deemed to have submitted to the jurisdiction if he applied for leave to defend the action. 32 M. 469. A Foreign court has no jurisdiction over a person who has never subjected himself by any acts of his to the authority of such a court. 26 C. 931. A foreign judgment will be binding only against the parties to it, and not others though they be partners with the former. 6 M. 273. A party who has submitted to the jurisdiction of a foreign court is bound by its judgment where such judgment is within jurisdiction and is not against natural justice. 90 M. 292. If a person as plaintiff, selected a court of foreign country as the one in which to sue, he cannot afterwards say that the judgment is not binding on him. 6 Q.B. 161; 2 B. and Ad. 757; 2 M. 400. Submission is not voluntary if the appearance is made only to save property which is in the hands of a foreign court. 39 M. 24. Where a defendant submitted himself to the jurisdiction of the court by giving a power-of-attorney to an agent, the defendant is bound by the judgment. 47 M. 877; 37 M. 163. A decree passed *ex parte* against a person in *absentum* is a nullity. But when such a decree is transferred to a British Indian Court for execution and the judgment-debtor appears in the course of execution proceedings and takes no objection to the jurisdiction of the foreign court and the validity of the decree and allows his property to be sold in execution proceedings, he is deemed to have submitted to the jurisdiction of the foreign court and cannot subsequently bring a suit to set aside the sale. 80 I. C. 754—26 Bom. L.R. 392. A defendant who raises objection in a suit and takes the chance of getting a decree in his favour is said to have submitted to the jurisdiction even though he raises an objection as to jurisdiction of the Court. 39 B. 34; 8 M. H.C. 14; 7 M. 184; 15 M. 82. A defendant who raises no objection as to jurisdiction is deemed to have submitted to its jurisdiction. 32 M. 469. The mere intention of avoiding an inconvenience that might happen in the future does not make the defendant's

appearance involuntary and the judgment is binding. 39 M. 733. The question of jurisdiction depends on the consideration whether the defendant owed, at the time the suit was brought, allegiance to the Foreign Law, either permanently or temporarily, or voluntarily submitted to the foreign jurisdiction. 13 M. 496.

Residence within the jurisdiction of the Foreign Court.—Where a person resides or carries on business within the jurisdiction of a foreign court he is bound by the judgment of such foreign court. 22 C. 222 P.O. ; 40 B. 551 ; 20 M. 112. Persons who carry on business through an agent submit to the jurisdiction of the territory by giving the agent power to institute and defend suits. 37 M. 163 ; 29 C. 509 ; 28 C. 641 ; 22 C. 222 P.O. = 34 P.R. 1898. The fact that the defendant was carrying on business in the foreign territory through his partners is no reason for holding that he was constructively residing there. 20 M. 112 (approved in 24 B. 86). The mere going to the foreign territory temporarily or to purchase goods will not give jurisdiction to the Court in it. 13 M. 496 ; 1 M. 196. O. XI, r. 1 (a) of the English Judicature Act constituting a legislative Act of the Sovereign power regulating the jurisdiction in the case of a British subject resident in British India and outside the ordinary jurisdiction of the English Courts gives the English Courts jurisdiction over the British subjects who are natives of British India, and a judgment of an English Court against such a person is within jurisdiction. 28 C. 641 ; 75 P.R. 1909 ; 35 I.O. 741 = 6 Bur. L.T. 106 ; 40 M. 112 = 3 I.O. 892 = 3 S.L.R. 81. A British Court does not recognise the jurisdiction of a foreign Court if the defendant did not reside in the jurisdiction or did not submit to its jurisdiction. 26 C. 93 ; 4 M. 359 ; 26 M. 544 P.O. ; 20 M. 112 ; 23 M. 458.

Possessing immoveable property within the jurisdiction of the Foreign Court.—When a person possesses immoveable property in a foreign country, the Courts in that country have power and jurisdiction to deal with such property. 20 M. 112 ; 4 Beng. 686 ; 3 Macq. 99. But such Courts have no jurisdiction *in personam* over the possessor (1909) 1 K.B. 302 ; 20 M. 112 ; 22 C. 222 P.C. ; 18 M. 327. The Courts of a foreign country have no jurisdiction to adjudicate upon the title or the right to the possession of any immoveable property not situate in such country, or generally to give redress for any injury to such immoveable property. In the case of judgments as to immoveables, the *forum rei sitæ* is absolutely conclusive. 37 I.O. 404 = 21 M.L.T. 315.

Agreement to submit to the jurisdiction.—Where there is an agreement to submit to the jurisdiction of the Foreign Court, the judgment of such court is binding on the parties. (1874) L.R. 9 Ex. 345 ; 32 M. 469 ; 37 M. 163.

Subject of the foreign territory.—A foreign judgment is conclusive in an action on that judgment if the defendant was a subject or resident of the country in which the judgment was rendered, but the mere making of the contract does not give jurisdiction. 1 M. 196 ; 13 M. 496 ; 34 P.R. 1898 P.C.

Cause of action arising in the foreign territory.—A decree based on a contract imposing personal obligation upon an absent foreigner is not countenanced by Comity of Nations only because the defendant entered into the contract in the territory of the foreign court which passed the decree. 32 M. 469 ; 40 B. 551 ; 23 C. 22 P.C. ; 1 M. 196. When the cause of action did not arise in the foreign Court, it had no jurisdiction. 66 P.R. 1889.

Absence of the defendant.—A judgment of a foreign Court passed *in absentum* against a person who at the time of suit or judgment was neither permanently or temporarily resident in, nor the subject of the same country, cannot be enforced against him in British India. 29 C. 509 ; 32 M. 469. A foreign judgment obtained *ex parte*

against a defendant described as a resident of British India cannot bind the defendant. 7 I.O. 810—8 M.L.T. 287 ; 32 M. 469.

Owing allegiance to the State.—When the defendant is neither the resident of the foreign state nor is a domiciled subject nor owes allegiance to that state, he is not subject to the jurisdiction of the foreign court. 22 O. 222 P.C ; 20 M. 112 ; 26 O. 971.

Law determining jurisdiction of Courts.—Whether a foreign court is or is not a court of competent jurisdiction within the meaning of clause (a) has to be determined in accordance with the principles of international law and not in accordance with the law of the country in which the foreign court is situated. 39 M. 733 F.B. ; 2 M. 407 ; 191 P.R. 1888 ; 26 O. 931. It is difficult to define in general the principles of international law for all nations. The cases above referred to give an idea of the law prevailing in India. Where a British subject living in India contracted with a person in London for the supply of newspaper and failed to pay the subscription for the paper, it was held that the court of the King's Bench had jurisdiction, as there was a breach of contract which should have been performed within the jurisdiction of the English Court, 3 S. L.R. 81.

CL. (B).—This clause refers to those cases where the controversy raised in the action has not been the subject of direct adjudication by the Court. 40 M. 112 P.C. ; 47 M. 877. A foreign judgment in favour of a plaintiff or a defendant omitting to answer interrogatories is not a judgment on the merits of the case and hence is not enforceable in India. 40 M. 112 P.C. Under the new Code as the concluding portion of S. 14, C.P. Code, has been omitted, the British Indian Courts cannot in a suit instituted on the basis of a foreign judgment inquire into the merits of the case except on the points specified in clauses (a) to (f) of S. 13. 13 P.W.R. 1916=34 I.O. 255. A foreign judgment, in a suit in which the defendant's solicitor accepts summons and makes appearance on his behalf, and which is made after a regular trial by Judge and jury in England is a judgment on merits, even though the defendant was suddenly called away from England to India on the outbreak of war. 41 A. 521. A wrong view as to onus will not have the effect of rendering a foreign judgment one not given on merits. 41 M. 205. Where a suit is brought on a foreign judgment and the judgment is one not on merits, the plaintiff must prove his case apart from the judgment sued upon under S. 13 (b) and (d) of the C.P. Code. 14 P.R. 1919. A judgment according to the law of the foreign court is on merits. 4 W.R. 107. An *ex parte* judgment is not necessarily on merits. 41 P.L.R. 1910. When the absentee defendants had no knowledge of the suit, a foreign court's decision will not be binding. 28 O. 641. A dismissal of the suit on the point of limitation is not on merits so as to preclude another suit in British India on the same cause of action except where the foreign law extinguishes the rights. 32 M. 469. A foreign judgment passed *ex parte* with jurisdiction and according to the English law of limitation but without regard to the law of limitation which is in force in British India is conclusive in a suit in Indian Courts based on the judgment. 2 S.L.R. 51.

Non-observance of strict procedure.—Foreign judgments are binding upon the parties thereto in British Indian Courts even though the formalities of procedure which ought to have been observed by the foreign Court, were not observed. 30 M. 292. A defendant is bound by the judgment in a foreign court against him as representative of his father. 2 M. 337. A foreign judgment obtained *ex parte* against a defendant as a resident of British India cannot bind the defendant. 7 I.O. 810=8 M.L.T. 287 ; 32 M. 469. A suit cannot be brought on a foreign judgment when it is not one for an ascertained sum of money. 9 M.L.J. 62. When a foreign judgment is pleaded as a bar to a suit in British India, it must be proved that the judgment relied upon is that of duly and regularly constituted Court of law having independent jurisdiction to try the matter in dispute and is decided finally. 2 P.R. 1889. When limitation bars the

remedy but does not extinguish the right, the judgment of a foreign Court is not open to objection that the suit was barred by the law of limitation applicable in the country where the contract was made. 2 M. 400. When the defendant appeared and had an opportunity of defending the action and he applied neither for extension of time nor for reopening the case, the judgment is held to be on the merits of the case. 20 I.O. 971. Irregularity of procedure is sufficient to refuse execution of the foreign judgment. 2 M. 400. Where a notice to the defendant was served on his agent who had power-of-attorney to sue in the Courts of Ceylon and to appear in any Court in Ceylon either as plaintiff or defendant, and the case is allowed to proceed *ex parte*, the *ex parte* judgment is considered as on merits. 47 M. 877. Where a defendant contested a suit filed against him in the Straits Settlements by filing a written statement on the date of the final hearing the defendant's solicitor stating he had instructions, and the court after hearing the plaintiff's evidence gave a judgment, it was held to be one on the merits so as to act as *res judicata*. 57 I.C. 742 = (1920) M.W.N. 412. A wrong view as to the legal liability of a party or as to onus nevertheless makes the judgment one on merits. 41 M. 205. A judgment of the English Court obtained by default cannot be sued upon, it not being a judgment on the merits. 24 Bom. L.R. 1245. The court which entertains a suit on a foreign judgment cannot make an enquiry into the merits of the original claim. 46 A. 199.

OL. (C).—The mistake must be apparent on the face of it. Where a decree of the court of a civil judge of Cooch Behar was sent for execution to a British Court and the copy of the record, instead of being signed by the judge was signed only by the sarishtadar, the executing court acted properly in sending back the record. 14 C. 546. An incorrect view of the law of British India or International Law is a ground for impeaching the foreign judgment. 191 P.R. 1888.

OL. (D).—A foreign judgment obtained without notice of the proceedings to the defendant is opposed to natural justice. 5 B. 223 ; 9 B. 346 ; 11 B. 241 ; 13 M. 496 ; 18 Bom. L.R. 486 ; 191 P.R. 1888 ; 8 B.H.C.R. 200 ; 66 P.R. 1889. A mere incorrect view of law by a foreign Court will not give jurisdiction to our Courts to say that the judgment is opposed to natural justice. 41 M. 205. It is not competent to Civil Courts exercising jurisdiction outside the Agency area to pass a decree for the sale of properties situate within the area. When such a decree is sought to be executed within the Agency area, the Agency court has a right to refuse execution on the ground that the decree is on its face without jurisdiction. 16 L. W. 669 = (1922) M.W.N. 728 ; 42 M. 813. When a judgment of Pondicherry Court was null and void by reason of an order of the court having adjudicated the defendant an insolvent, no suit could be brought on such judgment in British India. 23 M. 458 ; confirmed in 26 M. 544 P.C. A suit cannot be brought on a foreign judgment when it is not one for an ascertained sum of money. 9 M.L.J. 62. A foreign judgment is contrary to natural justice when pronounced by a court composed of persons having interest in the suit. 191 P.R. 1888.

OL. (E).—The Court is under no obligation to execute the decree of a foreign court where it is shown that it had been obtained by fraud. 15 B. 216. A foreign judgment may be impeached on the ground of fraud under this clause. 7 M. 164 ; 191 P.R. 1888 ; 8 Ch. D. 695. Mere concealment of facts is not sufficient to constitute fraud. 301 L.J.Q.B. 163. An error of law in obtaining a judgment is not fraud. 91 Hun. 43.

OL. (F).—A foreign judgment on a claim that would be time-barred in British India is not founded on a breach of any law in force in British India. 9 Bur. L.T. 106. A Foreign judgment passed according to the foreign law of limitation is conclusive in a suit in British India on the basis of the judgment even though it is not according to the law of limitation in force in British India. 46 A. 119 ; 2 S.L.R. 51 ; 35 I.O. 741 ;

S. 14.—The court shall presume upon the production of any document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a court of competent jurisdiction, unless the contrary appears on the record. But such presumption may be displaced by proving want of jurisdiction.

Where a suit is brought on a foreign judgment, every presumption is made in favour of such judgment. Therefore the onus is on the defendants that they had not submitted to the jurisdiction of the Foreign Court. 24 M.L.T. 244=49 I.C. 202; 41 P.L.R. 1910=165 P.W.R. 1909. Proceedings of a Court of justice when certified under S. 86 of the Evidence Act are presumed to be genuine and accurate. 27 C. 63 P.C.

INTEREST NOT AWARDED BY THE JUDGMENT.—The plaintiff cannot claim more than what appears on the face of the judgment. 75 P.R. 1909.

DECLARATORY SUIT THAT THE FOREIGN JUDGMENT IS COLLUSIVE.—A suit for a mere declaration that a certain decree has been collusively obtained is not barred by the provisions of S. 42 of the Specific Relief Act when it is not necessary for the plaintiff who is not bound by that decree, to seek to set it aside. No consequential relief can be asked for in the form of an order addressed to a foreign Court or of an injunction to a person not to execute a decree in a foreign territory. 4 M.L.J. 254.

JURISDICTION OF A SMALL CAUSE COURT.—A suit on a foreign judgment will not lie in a Small Cause Court. 37 P.R. 1889.

DOCTRINE OF LIS PENDENS.—The doctrine of *lis pendens* applies to Courts in British India. When lands situated in British India are the subject of a suit in a foreign Court, a sale or mortgage thereof cannot be affected immediately by these proceedings. 19 M. 257.

DECREES OF COURTS ESTABLISHED IN NATIVE STATES.—A decree passed by any court established or continued by the authorities of the Governor General in Council in the territories of any Foreign Prince or State, may, if it cannot be executed within the jurisdiction of the Court by which it was passed, be executed in manner herein provided within the jurisdiction of any Court in British India [S. 43.]

For a list of such Courts see the List D. The Court of Political Agent at Sikkim is a Court established or continued by the authority of the Governor General in Council, 38 C. 859. The Court of the Native Commissioner or Subordinate Judge of Kondh within the family domains of the Maharaja of Benares is such a Court. 34 C. 576.

THE DECREE OF THE COURT OF LAST INSTANCE ONLY IS CAPABLE OF EXECUTION.—A decree of an Indian Court may be enforced only in execution proceedings. No suit lies to enforce such decrees. 16 P.R. 1893; 93 P.R. 1879 P.C. When a decree is passed by a court of first instance it is final unless there is an appeal, revision or review from or amendment of the same according to law. The court may refer to the prior decree when the final decree is not complete in itself, or simply affirms that of the

court of first instance. 4 A. 376; 5 A. 589; 6 A. 48; 7 A. 366; 5 O.C. 35. Where a decree has been affirmed on appeal and is the final decree in the case, the fact that the decree-holder does not expressly ask the court to execute the decree of the court of appeal, is a mere technical irregularity and not enough for refusal of execution. 7 A. 366. Dismissal of application to execute the original decree is no bar to execution of appellate decree passed afterwards even where the decree of the lower court is confirmed on appeal. 19 B. 258. When an *ex parte* decree is set aside and a fresh decree on merits is passed, all execution proceedings under the *ex parte* decree are a nullity. 103 P.R. 1916. The final decree based on a preliminary decree which latter decree has been itself reversed has no life in it and the executing court is competent to determine whether the decree sought to be executed is in force or not and refuse execution if it has been superseded. 17 C.W.N. 868 = 19 I.C. 630. A plaintiff who obtains a decree for a part of his claim and has appealed as regards the part dismissed is not debarred from prosecuting the appeal because he has begun to execute the said decree. 31 P.R. 1907 F.B.

(A) Decree after appeal.—An appeal may be disposed of under O. 41, r. 11 or O. 41, r. 32. Under the former rule the appellate court may dismiss an appeal without serving notice of the appeal on the respondent under the circumstances noted therein; also when the appellant does not appear when the appeal is called on for hearing. When the appeal is so dismissed, the decree capable of execution is the decree appealed from. 36 A. 350 P.C.; 36 A. 284; 15 B. 370; 25 C. 311; 44 C. 954; 39 C. 925; 16 I.C. 945; 7 W.R. 521; 4 M.H.C.R. 32. When the appeal is not dismissed under O. 41, r. 11, then it may be heard and decided under r. 32 of the same order. Under this rule the order may be for confirming, varying or reversing the decree from which the appeal is preferred. 34 C. 925. In such a case the decree capable of execution is the decree of the appellate court. 4 A. 376 F.B.; 11 A. 267 F.B.; 10 B.L.R. 101; 8 C. 218; 34 C. 874; 18 B. 203; 13 C. 13; 5 C.W.N. 52; 19 B. 258; 39 B. 175; 13 A. 394; 46 C. 168; 11 A. 346; 22 C. 467; 7 B.L.R. 704; 11 B. 172; 2 B.H.C. A.C. 101; 11 B. 537; 23 W.R. 57; 11 C.L.R. 277; 20 C. 551; 48 P.R. 1906 F.B.; 7 A. 366; 44 C. 954; 22 B. 500; 24 C.L.J. 517. An order of the appellate court holding that the appeal had abated and that the respondent is entitled to his costs, is in effect an order confirming the decree of the lower court and the decree-holder is therefore entitled to begin his period of limitation from the date of such order. 32 A. 186. Where an appeal is preferred but subsequently withdrawn, it is the original decree which has to be executed. 22 B. 500; 13 B. 106; 15 B. 370; 16 B. 248. Even if the appellate Court holds that no appeal is maintainable from the decree, the decree of the appellate Court is executable. 43 A. 405. Where an appeal does not lie, as an appeal from an award, the order of dismissal of appeal is not a decree capable of execution and the period of limitation for execution begins from the date of the trial Court's decree. 1926 A. 440. See also, 36 A. 350 P.C. 1922 P.C.; 187.

(B) Decree after second appeal to the High Court.—The rules applicable in (A) above apply. When the decree is dismissed under O. 41, r. 11 the decree capable of execution is the decree of the first appellate Court. Where the decree is passed by the High Court in second appeal under O. 41, r. 32, confirming, modifying, or reversing the decree of the first appellate Court, it is only the decree of the High Court that is capable of execution. 7 A. 266; 13 C. 13; 39 B. 175.

(C) Decrees of Privy Council.—The principles applicable in (A) and (B) apply to the decrees and orders of the Privy Council. 36 A. 350 P.C.; 23 A. 152; 43 I. C. 855 = 3 Pat. L.J. 116; 8 C. 218. When an appeal against a decree is dismissed successively by the High Court and the Privy Council, the decree to be executed is the decree of the Privy Council in final appeal which in such a case is one affirming the decree of the lower Court. 28 C.W.N. 55 = 84 I. C. 267. Although an order of His Majesty in

Council may confirm the decree of the Court below, that order is the paramount one in the suit and it is only that order that can be executed. 8 C. 218 F.B.; 20 O. 551. Execution of the decree of the Privy Council could be ordered to proceed only upon the production with the execution application, of a certified copy of the order of the Privy Council, 5 O. 329. Limitation is to begin from the date of the order of the Privy Council, 4 A. 137.

(D) **Decree after Revision.**—The same rule that applies to the High Court decrees in appellate jurisdiction must also be applied to the High Court decrees and orders in revisional jurisdiction. 16 B. 50. When a revision application is rejected, it is the original decree or order that can be executed. Where a revision is admitted the order of the High Court alone is capable of execution whether it affirms, varies or reverses the order or decree of the lower court, (*Ibid.*).

(E) **Decree after amendment or review.**—Where a decree has been amended or the judgment is reviewed it is the amended decree that is capable of execution. 34 I. C. 393; or the decree that is passed after review. If after a decree is affirmed in appeal the lower Court amends it the amended decree cannot be executed. 11 A. 314; 11 A. 267; 4 A. 376 F.B. When during the pendency of appeal from a decree which was eventually confirmed, the decree-holder got it amended by the Court of first instance, such amendment could neither revive the decree nor furnish a starting point of limitation. 8 A. 432; 20 A. 304; 27 A. 575. The effect of O. 41, r. 35, C.P. Code, is to cause the decree of the appellate Court to supersede the decree of the Court below even when the appellate decree merely affirms that of the lower Court. In such a case the only decree that can be amended under S. 152, C.P. Code, is the decree of the appellate Court and it is only this decree that can be executed unless amended. The lower Court has no jurisdiction to order amendment of the decree in such a case and it is only the appellate Court that can do it, 11 A. 267 F.B. (followed in 18 M. 24 F.B.; applied in 18 B. 209.) See also *infra*. Specific directions contained in the decree or order of the appellate Court are beyond the judicial discretion of the lower Court and hence must be implicitly followed by the latter Court. The Court of first instance cannot in execution extend the time fixed by the appellate Court in the decree. 21 M.L.J. 1018 = 12 I.C. 139.

THE DECREE MUST BE A SUBSISTING ONE AT THE DATE OF APPLICATION FOR EXECUTION IN ORDER THAT IT MAY BE CAPABLE OF EXECUTION.

—A subsisting decree means a decree unreversed and in full force and not merely one upon which execution cannot be issued, 7 C. 91; 11 O. 376. A decree ceases to be capable of execution if it has been declared in a proper proceeding to have been obtained by fraud or collusion. Where a decree is obtained by A against B and C, and in a suit by C the decree against him is set aside on the ground of fraud, A cannot execute the decree against C but he can execute it against B as it is subsisting and not set aside. 30 C. 718; 29 M. 175; 10 B. 338; 25 M. 426. It is open to the executing Court to determine whether the decree which is asked to be executed is subsisting and operative or not, and if such a decree has been superseded and is no longer operative, the executing Court can refuse execution on that ground. 17 C.W.N. 868 = 19 I. C. 630; 143 P. R. 1890.

A DECLARATORY DECREE IS NOT CAPABLE OF EXECUTION.—A decree which merely declares the rights of parties and does not direct anything to be done under it is a declaratory decree and cannot be executed at all, 4 M. 219; 12 B. 416; (1894) A.W.N. 124. A decree declaring that the plaintiff is entitled to a monthly allowance is a declaratory decree and it is not capable of enforcement by execution but by a regular suit. 2 Agra 23; 22 B. 267. If a declaratory decree declaring the plaintiff's right to a monthly allowance also directs the defendant to pay the same from month to month

to the plaintiff, it is capable of execution as each allowance for a month falls due. 19 C. 189 ; 22 C. 903 ; 16 A. 179 ; 1 Agra 23 ; 7 C.W.N. 158 ; 9 A. 33. Where a maintenance decree provides that the decree-holder should have the right to enforce the recovery of the sums due to her by proceeding against the person and property of the defendant, the decree cannot be considered merely a declaratory decree and it can be enforced in execution. 25 I.C. 684 = 1 O.L.J. 403. Costs of a suit awarded by a declaratory decree may be recovered in execution proceedings. 109 P.R. 1913. When a decree for restitution of conjugal rights declared the rights of the husband to the restitution and ordered the wife to return to him, and it further declared that the husband should return certain ornaments to her and also made provision as to her future maintenance and residence, it was held that the provisions as to maintenance and residence were merely declaratory and no relief could be granted to her in execution proceedings. 1 S. L.R. 184.

Decrees creating a charge on property.—When a consent decree ordered payment of the decretal amount by instalments and created a charge on the estate of the judgment-debtor, the judgment-creditor is precluded from selling the properties in execution proceedings. He is bound to file a fresh suit under S. 67 of the T. P. Act for bringing such property to sale. 22 C. 859 ; 22 C. 903 ; 28 A. 58. Where in an ejectment suit a compromise was entered into by which maintenance of the tenant was provided, the decree could not be executed, being a declaratory decree. 37 A 97. The defendant in execution of a decree cannot plead that he is declared by the decree to be entitled to certain cattle and that they be set off against the decree. His remedy is to sue the plaintiff thereafter. 63 I.C. 975 (L). Where a decree declares that the landlord is entitled to measure the lands of his tenant, the decree is not capable of execution by deputing an Ameen to measure the village. But the landlord can himself proceed to measure the village. If he is resisted to measure by the tenants, he can invoke the aid of the authorities to assist him in carrying out his just rights. 7 O.L.J. 345. When in a mortgage decree for sale, a note is made that the plaintiff is competent to enter into possession till the sale, the decree does not direct possession to be given to the plaintiff and the plaintiff can get possession by a separate suit and not by execution. 8 P.L.R. 1915 = 27 I.C. 637.

Right to recover losses and expenses contingent on an uncertain event.—Where a decree directed that the plaintiff should satisfy certain debts due jointly by him and the defendant and on his failing to do so and the creditor realising the amount from the defendant, the plaintiff should be liable to pay the same along with losses and expenses to the defendant who should be entitled to have the money by execution through the Court, it was held that the right to recover losses and expenses being a right contingent on uncertain future event, could not be ascertained in execution of the decree itself, but was merely declaratory. It could only be enforced in a regular suit instituted in that behalf. 2 S.L.R. 33. A lien created by a declaratory decree is not extinguished merely because an application for execution was not made in accordance with the provisions of the Limitation Act. 109 P.R. 1913.

Effect of ordering execution of a declaratory decree.—Where several applications for execution of a declaratory decree are erroneously granted after notice to the defendant, a subsequent objection by the judgment-debtor that the decree is not executable cannot be entertained and he is bound by the order in execution. 24 M. 683 (referred to in 27 P.L.R. 1905).

Enforcement of a charge.—Where a charge is created by a decree with a direction for its payment, then on default of payment, the proper course is not simply to make an application, but either to apply for an order in the nature of a decree for an account and sale, or else institute a suit for the purpose of enforcing the charge. 2 O.W.N. 33.

Where a decree is merely declaratory and not capable of being enforced by delivery of possession, the remedy which the law gives by process of execution may by lapse of time be barred, and yet the right and title decreed may exist and be susceptible of enforcement by suit. 1 N.W.P. 154. Where a decree is not declaratory only it can be enforced in execution. 22 B. 267 ; 6 A. 109. A consent decree which did not direct possession of any land to be given to plaintiff, but merely declared the right of the defendant to remain in possession of some of the plaintiff's land could not be considered as a decree directing delivery of possession of the remaining lands to the plaintiff. 9 M. 29.

A DECREE OF WHICH EXECUTION IS BARRED BY LIMITATION IS NOT CAPABLE OF EXECUTION.—Limitation depends on the character of the Court passing the decree and not of the Court by which it is executed. 17 C. 491. Where a Native State Court decree is being executed by a British Indian Court, the law of limitation provided in the case of the latter Court governs the case. 40 B. 504 ; 14 O. 570. A decree of a Mofussil Court though it is being executed by the High Court is subject to three years' limitation prescribed by Art. 182 of the Limitation Act ; and when a decree of the High Court passed in its ordinary original jurisdiction is executed by a Mofussil Court the limitation applicable is 12 years under Art. 183. 11 I. C. 216 (O) ; 17 O. 491 ; 24 O. 473 ; 36 M. 109 ; 31 M. 24 ; 49 I. C. 982. For cases on limitation, see chapter on Limitation.

DECREES AGAINST PRINCES, CHIEFS, AMBASSADORS OR ENVOYS.—S. 86, C. P. Code provides for execution of such decrees which may be summed up as follows:—A decree against any prince or ruling chief whether in subordinate alliance with the British Government or otherwise, and whether residing within or without British India, or against any ambassador or envoy of a foreign state, cannot be executed by arrest and detention in civil prison ; nor can it be executed against their property, except with the consent of the Governor General in Council, certified by the signature of a Secretary to the Government of India.

The Governor General in Council may by notification in the Gazette of India authorise a Local Government and any Secretary to that Government to exercise with respect to any prince, chief, ambassador or envoy named in the notification the functions assigned by the sub-s. 86 (3) to the Governor General in Council and a Secretary to the Government of India respectively. S. 86 (4).

SCOPE.—The above provisions apply whether the suit is brought against a Ruling Chief in his Sovereign capacity or in his private capacity, such as a trustee of a temple in British India. 38 M. 695. The privilege mentioned in the section is a modified form of the absolute privilege and is based on the dignity and independence of the ruler, which would be endangered by allowing him to be sued, and the inconvenience

and complications which must be avoided. 21 B. 371. A Ruling Chief as such cannot be sued in British Indian Courts in respect of immoveable property acquired by him in British India, without the previous consent of the Governor General in Council. 21 P.R. 1909.

WANT OF CONSENT.—Where the want of consent is pleaded in bar of execution and the decree-holder applies for sanction, the Court ought to stay the proceedings till the consent is given. 53 P.R. 1906.

EXECUTION OF DECREES PASSED AFTER AGREEMENT OR COMPROMISE NOT TO EXECUTE THE DECREES.—The term decree means a decree that is susceptible and capable of execution and not a decree which is alleged by the defendant to be a mere formal decree not to be executed. 31 C. 179 ; 29 C. 810 ; 11 N.L.R. 110 ; 29 I.O. 838. The compromise and the decree being inconsistent in such cases, the latter supercedes the former and the plaintiff having allowed the decree to become time-barred cannot sue on the compromise to recover the sum which he might have got by execution of the decree. 1 L. 445. A contrary view is taken by the Full Bench of the Bombay High Court in 22 B. 463 ; in which case it was held that the question as to the existence of such an agreement ought to be determined in execution, and when such an agreement is proved the decree cannot be executed. The Madras High Court has followed the view taken by the Bombay High Court. 39 M. 541 ; 40 M. 233 F.B. Such an agreement can be given effect to in execution proceedings under S. 47 so as to operate as a stay of execution (*ibid.*). But it is held in (1918) M.W.N. 547 distinguishing 40 M. 837, that the question whether there was an agreement between the parties to a suit, that no decree should be obtained therein, cannot be gone into in execution proceedings. See also (1921) M.W.N. 382 = 64 I.O. 148. An agreement prior to suit which would be an answer to plaintiff's claim, but which is not pleaded in the suit, cannot be pleaded in bar of execution. An agreement that a decree to be passed should not be enforced affects the question whether the decree should be passed and should be made a ground of defence to the suit. An agreement, prior to the decree that the creditor should recover the whole amount of the decree (if passed) from another defendant and not from the defendant with whom the agreement is made, should be enquired into and decided upon in execution proceedings. 21 L.W. 725. An agreement prior to the decree that a lesser sum than what will be decreed is to be recovered does not refer to execution within S. 47 and cannot be gone into by the executing Court. 1926 R. 140.

EXECUTION OF DECREES SATISFIED OR ADJUSTED OUT OF COURTS.—Satisfaction of a decree out of Court is no satisfaction of the decree at all so far as the executing court is concerned, unless and until satisfaction is certified to the court and recorded by it under the provisions of O. 21, r. 2, C.P.C. Hence in such a case the decree-holder may execute his decree notwithstanding such satisfaction. The judgment-debtor has in such a case remedies both civil and criminal against the decree-holder which are dealt with in the following pages. Where a decree is admitted by the decree-holder to be satisfied it ceases to exist as a decree capable of execution. In such a case confirmation of the sale in execution should not be ordered. 18 N.L.R. 134 = 65 I.O. 331 ; 35 B. 516 ; 10 A. 332.

O. 21, r. 2.—(1) Where any money payable under a decree of any kind is paid out of court or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, the decree-holder shall certify such payment or adjustment to the court whose duty it is to execute the decree and the court shall record the same accordingly.

(2) The judgment-debtor also may inform the court of such payment or adjustment and apply to the court to issue a notice to the decree-holder to show cause on a day to be fixed by the court why such payment or adjustment should not be recorded as certified, and if after service of such notice, the decree-holder fails to show cause why the payment or adjustment should not be recorded as certified, the court shall record the same accordingly.

(3) A payment or adjustment which has not been certified or recorded as aforesaid, shall not be recognised by any court executing the decree.

OBJECT OF THE RULE.—The object of the rule is that the court executing the decree should not be troubled with any dispute between parties with regard to any payment or adjustment unless the same has been duly recorded or certified. If there is a case of fraud, then the party defrauded will have his right of action, 23 Bom. L.R. 981. The rule was enacted to prevent the courts being flooded with false defences to applications for execution setting up a payment or adjustment in part or in whole which would be made merely to gain time. 1 Bur. L.J. 226. The object of the rule is to provide that everything promoting the execution of a decree should be made a record of the court so as to give the court a complete control over its decree and execution thereof. It does not make payments or adjustments which are not recorded or certified to be invalid. 10 M.L.T. 442; see also 38 A. 204; 10 M.L.J. 213.

SCOPE.—Applications for orders absolute under O. 34—O. 21, r. 2, does not apply to applications for orders absolute or final decrees in mortgage suits, such applications not being applications for execution of the decree. 39 P. 592—57 I. O. 473—1 Pat. L. T. 416; 16 C.L.J. 159; 2 Pat. L.J. 538; *contra* held in 40 I.O. 845—21 O.W.N. 920. O. 21, r. 2 does not prohibit an inquiry into the plea of the defendant that the debt had been paid, if it arises in the course of proceedings on an application for orders for final decree for foreclosure of the mortgage. 16 C.P.L.R. 111. This rule applies to a final decree in a mortgage suit under O. 34, rr. 2 and 3. 69 I.O. 443; 1923 N. 200.

The rule does not apply when there is no existing decree. 40 M. 233 F.B. This rule does not apply when the right of the decree-holder to execute the decree is in question and not merely an adjustment of the decree. 40 M. 296. This rule does not apply to a decree which was fraudulently obtained and an admission by one of the decree-holders is required to be proved that the decree was fraudulently obtained. 16 O.W.N. 951. The provisions of O. 21, r. 2, were never intended to be applied to a case when the parties agreed between themselves that their debts were to be privately adjusted before any decree came into existence. 2 I.O. 608—6 A.L.J. 403.

When the transferee applies.—When the transferee applies under O. 21, r. 16 to the Court that passed the decree for recognising the transfer, the judgment-debtor can plead that the claim has already been satisfied even though the formalities prescribed by O. 21, r. 2 (1) and (2) have not been followed, on the ground that such a court is not a Court executing the decree but acting as a Court that passed the decree and the prohibition laid under r. 2 (3) is for the executing Court. 47 B. 643.

This rule applies only to parties who stand in the relation of decree-holder and judgment-debtor at the date of payment or adjustment. When A obtained a money

decree against B, and B transferred certain immoveable property to C, in consideration of which C promised to pay the amount of the decree to A, and C paid the amount of the decree to A, and subsequently C got the decree transferred to him from A and then applied for execution of the decree against B; it was held that payment of decretal amount by C to A though not certified is a bar to execution, because the payment was made not by B, the judgment-debtor but by C a third party. 19 M. 230; 35 M. 659; 137 P.R. 1888; 13 A. 339. The adjustment contemplated by the rule is one between the decree-holder and the judgment-debtor, and not one between the judgment-debtor and one claiming to be the decree-holder. 7 I.O. 55=12 C.L.J. 312; 137 P.R. 1888. When the decree directed the payment of rent or, in default, the plaintiff to recover possession of the tenure, rents paid by the defendant to the plaintiff need not be certified and such rents must be deemed as paid under the decree. 18 B. 690. The surety does not come within the purview of O. 21, r. 2 (3) and is not barred from relying on an uncertified adjustment in discharge of his liability. 1926 S. 105.

- 4 **DECREE OF ANY KIND.**—O. 21, r. 2, applies to all kinds of decrees including mortgage decrees. 57 I.O. 473=1 Pat. L.T. 416; 10 C.L.J. 169=7 I.O. 625; 25 C.L.J. 553; 15 M.L.T. 238=23 I.O. 530; 6 I.O. 43; 44 P.R. 1906; 11 N.L.R. 16; 27 I.O. 919; 28 M. 473 F.B.; 20 N.L.R. 122=83 I.C. 162; 7 I.C. 258=7 I.C. 625; 30 A. 248; 12 C.L.J. 65; 13 O.O. 137; 12 C.W.N. 282; 40 I.O. 820 (A decree for partition). An adjustment with regard to property in a partition decree is an adjustment. 43 M. 476. A contrary view is taken in the following rulings that this rule applies to money decrees only. 15 M.L.T. 338=23 I.O. 530; 21 I.O. 177=25 M.L.J. 442; 1926 M. 749. The corresponding section of the old Code applied to money decrees only. 22 M. 182; 28 M. 473 F.B.; 24 M. 412. Profits of land received by a usufructuary mortgagee are not monies payable under a decree under O. 21, r. 2. 28 M. 473 F.B.; 39 M. 1024.

ADJUSTMENT.—An arrangement made by a judgment-debtor with the decree-holder to the effect that if the former makes default in the payment of instalments, the decree-holder should not thereby be entitled, as otherwise he would have been by the decree, to realise the whole amount of the balance of money, but should only be entitled to sell certain estate and should then be debarred from proceeding with the execution of his decree until further default had been made is an adjustment within the meaning of O. 21, r. 2. 14 C.L.J. 451=13 I.O. 326. The award of the arbitrators on a reference during the execution proceedings is an adjustment. 3 Pat. L.W. 146=42 I.O. 467. A discharge of one of the judgment-debtors is an adjustment. 40 I.O. 1; 4 M.L.T. 229. When one of the conditions of an agreement is not performed, it is not an adjustment. 16 C.L.J. 101=16 I.O. 972. An agreement to hold certain properties in common is an adjustment where the decree contemplates division by metes and bounds and the award of a definite half-share. 40 I.O. 820=(1917) M.W.N. 327. An inchoate contract to adjust a decree is not an adjustment. 43 I.O. 557. Enjoyment of rights by the decree-holder under the decree is not an adjustment. 39 M. 1026. A title given by a decree-holder to his vakil directing him to put an acknowledgment of having received the decretal amount is an adjustment if certified. 7 W.R. 510. An adjustment between the parties to a decree by which arrangements are made to enable the decree-holder to collect moneys due to the judgment-debtor and credit them towards his decree, and which provides for a temporary suspension of execution proceedings, has not the effect of cancelling the decree and is not an adjustment. 7 A. 424. An agreement by the decree-holder to accept in full satisfaction of the decree an amount less than the decretal amount is an adjustment of the decree. 91 I.O. 1051=49 M.L.J. 730. An agreement to pay an enhanced rate of interest on the decretal amount, in consideration of the decree-holder granting an extension of time for payment

is not an adjustment. 86 I.O. 723=1925 M. 457. A receipt reciting satisfaction of the decree given by the decree-holder to the judgment-debtor on a promise by the latter which he has never attempted to discharge is not an adjustment, 85 I.O. 676=1925 M. 206. An agreement by a decree-holder in a composition by his judgment-debtor with his creditors generally to accept a percentage of his decretal amount in full satisfaction is an adjustment, 1926 M. 184=91 I.O. 1051. An adjustment is not the same thing as satisfaction of the decree. It is some method of settling the decree which is not provided for in the decree itself (*ibid*). Under the terms of a decree the mortgagee decree-holders were to be in possession of the mortgaged property for six years, to render accounts every year and to give credit for the surplus income if any; and at the end of six years the judgment-debtor applied for taking accounts and possession. It was held that the receipt of income by the decree-holders was not a payment or adjustment under O. 21, r. 2, and did not require to be certified within 90 days of the receipt by the decree-holder, 39 M. 1026. If between the passing of the preliminary decree and the passing of the decree for sale the defendant (mortgagor) obtains a certificate under O. 21, r. 2 he can take advantage of that to reduce the amount for which the property is to be sold, 42 M. 61; 25 C.L.J. 553; 16 C.L.J. 169=7 I. O. 625. An agreement, in order to constitute an adjustment of the decree should be made subsequent to the decree, 40 M. 233 F.B.; 1 Lah. 445; (1918) M.W.N. 547=46 I. O. 880; 15 C.L.J. 88=13 I.C. 944; 43 M. 725; 37 M.L.J. 356=54 I.O. 137. Where in consequence of the refusal of the party, entitled to payment, to receive it, a suit is filed to enforce the award and the award is made a rule of court, the tender can be pleaded in execution proceedings as an adjustment under O. 21, r. 2 and the decree-holder forfeits his right to interest from the date when it was made, (1917) M.W.N. 308=38 I.C. 295; (32 M.L.J. 13 followed). An instruction to the court by the decree-holder in his application for sale that the net profits should go in deduction of the decretal amount is an adjustment, 29 M.L.J. 219; 30 I.O. 357. The adjustment referred to in O. 21, r. 2, is a transaction which extinguishes the decree as such in whole or in part and results in a satisfaction of the whole or a portion of the decree in respect of the particular relief or reliefs granted by the decree. A transaction, by which the parties agree to vary the mode by which the reliefs granted by the decree are to be realised in execution in that suit, or the time when the decree becomes executable is not an adjustment of the decree, but it is a transaction which attempts to vary the terms of the decree, which is against the policy of the O. P. Code, 17 M.L.T. 222=28 I.C. 376, (*contra* in 1926 R. 140). An adjustment means some kind of satisfaction or payment of the decree, 9 O. & A.L.R. 189; 80 I.C. 454. A payment out of Court to one of the creditors must be for the benefit of all the decree-holders, 9 O. 831. An arrangement made pending an appeal that the original decree is satisfied (which is the subject of appeal), can be pleaded in bar of execution of the appellate decree, 44 M.L.J. 599=72 I.C. 836. Payment to a third person when a decrees so provides it, is an adjustment, 45 A 304. When a decree is reversed on appeal any payment made, whether certified or not, can be restored by a court as it is not a payment or adjustment of the decree, there being no longer any subsisting decree, 11 B. 724. Payment in satisfaction of a decree afterwards split up into shares, if made through the court and while the decree is entire, ought to be set off as in satisfaction of the whole decree, 20 W.R. 131. When a judgment-creditor gave a receipt to a surety stating that the matter was settled as far as the surety was concerned, it amounted to an adjustment, 32 P.R. 1871. An agreement to release the debtor of all liability to pay his share of the decretal debt in consideration of a sum paid by him is an adjustment under this rule, 26 I.C. 944; 2 L.W. 109; 50 O. 217. An agreement giving time to the judgment-debtor is an adjustment, 2 O. L.R. 148; 61 P.R. 1886; 2 I.O. 991; 13 I.C. 926 (*contra* in (1915) M.W.N. 225 and 28 I.O. 376). See *contra* below. An assignment of a decree for the benefit of the judgment-debtor is an adjustment, 10 M.L.T. 442. An agreement which is in effect an adjustment

is one under this rule. 10 M.L.T. 442. Payment to the transferee of the decree is an adjustment, 14 I.C. 702 ; and the judgment-debtor should be allowed to prove it (*ibid*). A composition deed by means of which the judgment-debtor transferred all of his property to trustees to pay off his debts and he was released from personal liability is an adjustment. 2 M.L.J. 221. A purchase of the decree by the judgment-debtor in execution of some other decree is an adjustment. 10 W.R. 354. An arrangement between the parties that the decretal amount should be paid by instalments and recorded duly by court is an adjustment under O. 21, r. 2, and is an amendment of the decree under O. 20, r. 11. 61 P.R. 1886. 2 C.L.R. 143. An agreement between the parties to a decree to reduce its amount is an adjustment. 2 C.L.R. 143 ; 61 P.R. 1886. An adjustment by which the property not liable to attachment and sale was made liable is not enforceable and the decree-holder can proceed otherwise in execution. 2 O. L.R. 143. An oral agreement by the decree-holder, which is not yet performed by either party is not an adjustment. The judgment-debtor cannot insist on the contract being completed and then pleaded in bar of execution. 44 A. 258. An arrangement between parties enlarging the period of limitation prescribed is not an adjustment and it cannot be recognised by a court. 13 W.R. 44 F.B. ; 17 W.R. 396 ; 23 W.R. 129 ; 4 B.L.R. 101 F.B. In a suit by a Hindu to recover certain lands the defendant's plea that he held the land under a mortgage executed by the plaintiff's mother as his guardian in adjustment of a decree obtained against his deceased father was held not maintainable under O. 21, r. 2. 14 M. 469 ; 11 B. 6. An oral adjustment of the decree is covered by the section. 91 I.C. 705 = 1926 O. 643.

EFFECT OF ADJUSTMENT.—An adjustment of a decree duly certified in accordance with the provisions of O. 21, r. 2 has the effect of a decree. 20 N.L.R. 122 = 83 I.C. 162. The adjustment between the decree-holder and the judgment-debtor after the sale but before confirmation of sale of the property of the judgment-debtor does not affect the right of the auction-purchaser in getting the sale confirmed. 10 I.C. 148.

CONSIDERATION FOR THE ADJUSTMENT.—Section 257-A of the old Code is wholly omitted in the present Code. The reason for this omission is thus stated in the report of the Select Committee. "The committee think that S. 257-A may be omitted with advantage. It was first enacted by Act XII of 1879 with a view to protect the interests of judgment-debtors against the exercise of undue pressure by decree-holders. The section has given rise to conflicting decisions, and as interpreted by the majority of the High Courts is found in practice to be of little service to judgment-debtors. Moreover S. 16 of the Indian Contract Act, as amended, appears to the committee to afford protection where it is required." Under the old Code of 1882, the court was required to see whether the consideration for an adjustment was reasonable under the circumstances or not. No such duty is now cast on the court. 86 I.C. 907 = 1925 O. 364.

CERTIFICATION BY THE DECREE-HOLDER—Form of Certification.—Statement of certification of payment in execution application by the decree-holder is sufficient, 86 I.C. 1051 = 1925 O. 1012 ; 43 O. 207 ; 52 I.C. 804 F.B. ; (1919) M.W.N. 507 = 49 I.C. 141 ; 83 I.C. 360 ; 50 I.C. 364 ; 45 O. 630 ; 75 I.C. 1029 ; 13 S.L.R. 37 ; 26 C.W.N. 529 64 I.C. 32 = 26 O.W.N. 536 ; *contra* see below. There is no particular form prescribed in which a decree-holder must certify his payment to the court. 26 C.W.N. 529 ; 55 P.L.R. 1919. In the absence of a reasonable explanation the decree-holder cannot be allowed to retract his admission (*ibid*) ; also 53 I.C. 527 ; 24 M.L.J. 88 = 17 I.C. 752. A decree-holder can apply for review of the order of certification if the decree-holder made a mistake in giving his consent to the order. 35 I.C. 369 = 10 Bur. L.T. 30. A statement in an execution application that payments towards satisfaction of the

decree were made out of court does not amount to an application for certification. 1922 Cal. 200=64 I. C. 32; 45 O. 630; 28 O.W.N. 320. A certification on the warrant of arrest by the plaintiff's authorised pleader that the decree was satisfied, complied with the requirements of the rule. 84 I.C. 588. If the court which is called on to execute the decree finds that no payment has been certified and recorded when the application is made to it, it is bound to assume that no payment has been made and the decree-holder is not entitled to ask that a statement in the application itself that a certain payment has been made by the judgment-debtor, should be treated as a certification of the payment within the meaning of O. 21, r. 2, Civ. Pro. Code. 46 A. 635. An adjustment taken to the notice of the Court at the time of execution of the decree is a certification. 32 P.R. 1871. A certification of a decree in favour of a minor by a person not a guardian of the minor and without the leave of the court shall not be made. 29 M. 309. An application for execution stating that an adjustment was made by him out of court under duress and that he should be allowed to execute the decree amounts to a certification to the court. 32 P.R. 1871. One of the joint decree-holders cannot certify as to the complete satisfaction of the decree. At the most it will operate to the extent of his share. 34 P.R. 1906; 26 A. 334. There is nothing in O. 21, r. 2 which prohibits an executing court from treating an admission of payment in a decree-holder's application for execution as an application to certify such payment. 16 S.L.R. 207=83 I.C. 360; *contra* see above. No particular words are necessary for certification. 29 M.L.J. 219. It is sufficient for the decree-holder to certify that money has been paid or that an adjustment has been arrived at without specifying the amount of the payment or mentioning the terms of the adjustment. 2 Bom. L.R. 901. A petition signed and filed by the decree-holder in court certifying payment is sufficient certification. 12 W.R. 358; A.W.N. (1888) 115. An application informing the court of a payment which had just been made in satisfaction by the judgment-debtor is a sufficient certification. A.W.N. (1881) 168; 33 M.L.J. 219. An acknowledgment of payment by the decree-holder in an execution application is a certification of payment to the court. 33 M.L.J. 219=(1917) M.W.N. 502. Nothing is prescribed in O. 21, r. 2 as to the time within which or the manner in which the decree-holder must certify payment. A statement by the decree-holder in his application for execution of the fact of his receiving a portion of the decree amount within 3 years of the application can be accepted as a certificate of payment under O. 21, r. 2. Such a payment if proved operates to save limitation under S. 20 of the Limitation Act. 41 M. 251. When the amount paid was not certified in the proper place of adjustment in the application it was not considered as a proper adjustment. 19 C.L.J. 126.

WHO CAN CERTIFY.—One partner can receive payment of decretal amount and satisfy adjustment. 1926 S. 167=92 I.C. 387. An adjustment of a decree made by a guardian without obtaining permission of the court under O. 32, r. 7 cannot be certified under this rule. 29 M. 309; 82 I.C. 588. One out of several joint decree-holders is not competent without direct authority from the other decree-holders to certify under O. 21, r. 2 satisfaction by payment out of court of the entire decree. 26 A. 334; 34 P.R. 1906; 2 B.L.R. App. 43; 15 O. 343; 1 Agra Mis. 16; 4 C.L.R. 70; 25 M. 491; 31 M. L.J. 93=35 I.C. 157; 9 C. 831; 89 I.C. 195=1925 P. 822. A court cannot refuse to record adjustment by payment to the transferee of the decree merely on the ground that the transferee had not been formally recognised under the old Code, there being nothing in the old Code to indicate that transferee's rights take effect only on recognition. 14 I.C. 702. The holder of a decree that is attached may certify payment or adjustment of the decree if it was made *bona fides* and before the attachment. 2 M.L.J. 238; 16 B. 522. A creditor of the decree-holder should not be given an opportunity to prove the adjustment fraudulent. 5 M.L.J. 72=2 I.C. 523.

THE DECREE-HOLDER SHALL CERTIFY.—O. 21, r. 2 puts on the party applying for execution the obligation of stating any adjustment between the parties after decree. 2 M. 216. As to the effect of not certifying see "The remedies of the judgment-debtor," *infra*. The law casts a duty on the decree-holder to certify the payment made to him. A failure to make such a certificate to the court makes the decree-holder liable to a refund by suit. 30 M. 545.

SHALL CERTIFY TO THE COURT WHOSE DUTY IT IS TO EXECUTE THE DECREE.—An adjustment of decree out of Court which is not certified to the court executing the decree can duly be ignored in proceedings in execution. 58 I.C. 123 ; 25 M.L.J. 586=21 I.C. 639. For a proper satisfaction under O. 21, r. 2 the adjustment should be notified to the court whose duty it is to execute the decree in a form which will come before it in its execution work. 68 I.C. 645=3 Pat. L.T. 427. A casual reference to such an adjustment in a plaint or other civil proceeding is not sufficient. 13 S.L.R. 130=52 I.C. 901. When execution is transferred to the Collector, an adjustment certified before the Collector is sufficient to come under the rule. 16 A. 228. A court dealing with discharge or satisfaction of the decree is said to be executing the decree. 7 C.W. N. 172. The court to which a decree is sent for execution continues to have jurisdiction in the case until it sends a certificate under S. 41, C. P. Code, to the Court which passed the decree. Any application for adjustment or certification of the adjustment before a certificate under S. 41 is sent to the court which passed the decree, must be made to the court to which the decree was sent for execution, and not to the court which passed the decree. 85 I.C. 455=28 O.C. 169. A payment, in part satisfaction of the decree, made out of court after the execution is transferred to another court but before any application is put in for execution, may be certified under O. 21, r. 2 to the executing court which may call upon the decree-holder to certify the fact of part payment. 5 C. 448.

TIME OF CERTIFICATION.—The certification must be made by the decree-holder within the limitation for an application to execute the decree. Otherwise it cannot be recognised. 12 A.L.J. 825=24 I.C. 215 ; 50 I.C. 242 ; 4 Pat. L.J. 159 ; 12 A.L.J. 387=23 I.C. 753 ; 64 I.C. 72 (Cal.) (*contra* in 33 M.L.J. 219) ; 86 I.C. 1051=1925 C. 1012 ; 64 I.C. 72. There is no period of limitation prescribed for the decree-holder to certify a payment. The intention of the law appears to be that the payment should be certified within a reasonable time. It is primarily the duty of the decree-holder to certify. 46 A. 635. No time is provided within which an application for certification of a payment must be made under the rule. But such an application cannot be made after the period of limitation for execution has expired. A decree cannot be revived which has already been barred, by certification after time. 11 O.L.J. 379=79 I.C. 799. There is no period prescribed for a decree-holder to certify any adjustment out of court. 63 I.C. 535=6 Pat. L.J. 337. A decree-holder may certify payment at any time, 21 B. 122 ; 12 M.L.T. 592 ; 21 O.C. 161 ; 29 M.L.J. 669 ; 20 C.L.J. 131 ; 33 M.L.J. 219. A certification after the execution of the decree is barred, does not extend time. 24 I.C. 215 ; 12 A.L.J. 825. An application to certify payment after (3 years) its execution is barred is time barred. 11 B. 57. An order certifying payment although on an application barred by time is conclusive unless set aside in appeal. 35 I.C. 369=10 Bur. L.T. 30. A judgment-creditor may at any time forgive the amount due under the decree and certify satisfaction without receiving payment. A creditor of the decree-holder should not be given an opportunity to prove that satisfaction was fraudulently made to defeat his rights. 5 M.L.T. 72=2 I.C. 523. The certification need not be on some day or at some time different from that on which the application for execution is made. 43 O. 207. When a decree is attached it can be adjusted by the decree-holder subsequent to the attachment. 16 B. 522.

EFFECT OF CERTIFYING ADJUSTMENT.—A creditor of the decree-holder should not be given an opportunity to prove that satisfaction was fraudulently made to defeat his right. 5 M.L.T. 72=2 I.C. 528 (*contra* in 51 I.C. 411=35 M.L.J. 252). A certification by the decree-holder is conclusive and the court cannot call upon the judgment-debtor for proof of payment. 55 P.L.R. 1919; 53 I.C. 527; 24 M.L.J. 88=17 I.C. 752.

INQUIRY INTO THE TRUTH OF CERTIFICATION.—O. 21, r. 2, does not contemplate an inquiry being made into the truth of the statement of the decree-holder when he comes to the court to certify payment and the judgment-debtor has no *locus standi* to question the right of the decree-holder. 21 O.C. 191=47 I.C. 177. When the decree-holder certifies a payment and the judgment-debtor denies such payment the court should take evidence on the point and then come to a conclusion one way or the other. 45 B. 91. When a person obtains a decree against the decree-holder and attaches his decree and the latter subsequently applies to the court to record satisfaction of his decree and the attaching decree-holder objects that the certificate of satisfaction is collusive and fraudulent, the burden of proving its collusive and fraudulent nature is on the attaching decree-holder and it does not lie on the judgment-debtor to prove the *bona fides* of the certificate. When once a court is seized of an application to enter up satisfaction as above, it is bound to make an enquiry and see whether the decree has been satisfied and the court will not be justified in allowing an application to be withdrawn. 35 M.L.J. 252=51 I.C. 411; see *contra* in 5 M.L.T. 72=2 I.C. 528. An allegation that an adjustment of a decree out of court is fraudulent must be gone into and decided by the court of execution. 41 A. 443.

THE COURT SHALL RECORD THE ADJUSTMENT.—The adjustment must be recorded as it stands and the court cannot interfere. 7 N.L.R. 126. No enquiry is to be made into the truth of the statement of the decree-holder. 21 O.C. 161. The rule is imperative (*ibid*).

RECORDING OF THE CERTIFICATION BY THE COURT.—The payment or adjustment is not required to be both certified and recorded. A judgment-debtor does not lose the protection given to him under O. 21, r. 2 merely because the court fails to perform the duty cast upon it, viz., to make a record that the payment or adjustment has been certified by the decree-holder. 21 O.L.J. 362=30 I.C. 45. O. 21, r. 2, contemplates a formal proceeding consisting of two steps: first an application by the decree-holder informing the Court of the payment; and secondly, a formal order of the court recording the payment. 46 A. 635. The words "certified or recorded" in O. 21, r. 2, do not mean "certified and recorded". When there is a certificate by the decree-holder under sub-rule (1), the mere neglect by the court of its duty to record cannot prejudice the judgment-debtor. The record by the court being a formal order may be made at any time or be treated as having been made. (1919) M.W.N. 507=49 I.C. 141. The court shall record the adjustment in two cases. First when the decree-holder under sub-rule (1) certifies the payment or adjustment, which is dealt with above. Secondly under sub-rule (2) and the circumstances mentioned therein the court shall record the adjustment as certified, which is dealt with below.

MANNER OF RECORDING.—An adjustment may be recorded by dismissing the application for execution with the consent of the decree-holder on the ground that the decree has been satisfied. 10 Bur. L.T. 30.

THE JUDGMENT-DEBTOR ALSO MAY INFORM THE COURT OF THE PAYMENT OR ADJUSTMENT.—Judgment-debtor.—The word "judgment-debtor" in this rule includes persons claiming under him. 30 M. 537; 50 I.C. 931=9 L.W. 596; 14 M.L.J. 417.

The judgment-debtor shall apply.—The counter-affidavit of the judgment-debtor cannot be recognised as an application under r. 2 (2). 24 M.L.J. 88 = (1912) M. W.N. 1245. The written statement of the judgment-debtor alleging adjustment may be taken as an application for adjustment under sub-rule (2). 11 I.C. 780 = 4 Bur. L.T. 162. A person who possesses a right to a property is within his rights in applying under O. 21, r. 2 (2) for entering up satisfaction of decree affecting the property, which would otherwise endanger his right to it. Such a person is the representative of the judgment-debtor and has a *locus standi* to apply. 50 I.C. 931 = 9 L.W. 596. A surety for the judgment-debtor is bound so long as the judgment-debtor is bound, and the surety cannot set up an uncertified payment by the judgment-debtor in bar of execution. 67 I.C. 885 ; 1923 Cal. 313.

Notice to the decree-holder.—The court is bound, on information being given by the judgment-debtor, that the decree has been adjusted to issue notice to the decree-holder to show cause why the adjustment should not be recorded as certified. 1923 Nag 20.

Limitation for application by judgment-debtor.—A judgment-debtor must inform the court of such adjustment within a period of ninety days from such payment or adjustment under Art. 174 of the Indian Limitation Act. 22 I.C. 963 ; 24 O.L.J. 462 ; 7 I.C. 625 ; 25 I.C. 684 ; 4 Pat. L.J. 159. The judgment-debtor need not wait till the decree-holder fails to apply for certification, but may apply as soon as he has paid the money. 12 M.L.J. 94. If the decree-holder fails to certify, the law allows the judgment-debtor to inform the court of the payment and for the judgment-debtor's application a period of ninety days has been provided by Art. 174 of Sch. I of the Limitation Act. 46 A. 635. An application by a judgment-debtor to record satisfaction of a decree made by him more than three months from the payment as against him is barred even though it may be within three months from the date of a revised decree as against defendants other than himself. The two decrees cannot be consolidated for the purpose of limitation as one. 31 I.C. 917. Where the time allowed by Art. 174 has expired the court cannot enquire into the judgment-debtor's allegation with respect to an adjustment. 1945 Lah. 566 = 87 I.C. 635 ; 36 M. 357 ; 22 I.C. 963 ; 2 L.W. 109.

INQUIRY INTO THE FACT OF ADJUSTMENT ON THE APPLICATION OF THE JUDGMENT-DEBTOR—O. 2, r. 21, provides that the judgment-debtor may inform the Court of an adjustment and the decree-holder will be called upon to show cause why such an adjustment should not be recorded. The Court may enquire into the fact of payment or adjustment. 52 I.C. 764 ; 4 Pat. L.J. 159. It is not open to the court of execution to enquire into the fact of a payment or adjustment of a decree which has not been certified or recorded as provided in clauses (1) and (2) of O. 21, r. 2, even when the conduct of the decree-holder is alleged to have been fraudulent, 88 I.C. 48 ; 49 M. 325 ; 16 C.W.N. 923 = 13 I.C. 69 ; 15 C. 557 ; 79 I.C. 89 ; 17 M.L.J. 527 ; 13 I.C. 326 = 15 C.L.J. 451 ; 29 M. 312 ; 1923 Rang. 103 ; (*contra* in 12 C.W.N. 425 ; 21 M. 356 ; 40 B. 333 ; 9 C. 788 ; 19 M. 230 ; 41 A. 443). If the application by the judgment-debtor is not made within the prescribed period of 90 days, the court cannot enquire into the adjustment. 22 I.C. 963 = (1913) 1 U.B.R. 191 P.O. ; 13 I.C. 221 ; 48 I.C. 765 ; A.W.N. (1891) 11 ; (1911) 2 M.W.N. 473 ; 19 C.W.N. 650 = 21 I.C. 926 ; 4 Pat. L.J. 159 ; 36 M. 357 ; 2 L.W. 109 ; 1925 Lah. 566 = 87 I.C. 635. An allegation that an adjustment out of court is fraudulent must be gone into by the court of execution. 41 A. 443 ; 40 B. 333 ; 21 M. 356 ; 9 C. 788 ; 19 M. 230. The words "to show cause" do not merely mean to allege cause, nor even to make out that there is room for argument, but both to allege cause and prove it to the satisfaction of the Court, and it is incumbent upon

the court to investigate and decide any question of fact on which the parties may not agree. A.W.N. (1884) 40 ; 31 M.L.J. 207 = 35 I.C. 70 ; A.W.N. (1888) 82 ; 13 S.L.R. 71 = 51 I.C. 567 ; 29 M.L.J. 219 ; 11 O. 166. An enquiry into the terms of an alleged compromise cannot be made on the application of the decree-holder. (1912) M.W.N. 1245 = 24 M.L.J. 88. It is not open to an executing court to investigate the fact of payment in respect of the decretal amount or of the adjustment of the decree out of court in execution proceedings unless recorded or certified under O. 21, r. 2, clauses (1) and (2). 83 I.C. 162 ; 80 I.C. 454 ; 82 I.C. 588 ; 79 I.C. 89 ; 89 I.C. 1009 ; 48 B. 548 ; 91 I.C. 979 ; 68 I.C. 924 ; 1925 R. 349 ; 78 I.C. 776 ; 135 P.R. 1919 ; 55 I.C. 655 ; 40 I.C. 889 ; 65 I.C. 820 ; 50 I.C. 242 ; 58 I.C. 123 ; 55 I.C. 890 ; 48 I.C. 765. When fraud had been committed on the court by reason of false statement of the decree-holder as to the satisfaction of the decree, he was disallowed to proceed with his execution application. 30 B. 333. In determining the question of sufficiency of cause shown by the decree-holder, it is incumbent upon the court to investigate and decide any question of fact upon which the parties may not be agreed, upon such materials as they may legally place before it. In investigating the matter, the evidence may be given orally or by affidavit. 11 O. 166 ; A.W.N. (1884) 40 ; A.W.N. (1888) 82 ; 35 I.C. 70. Even when the judgment-creditor is guilty of fraud the executing court will refuse to recognise the payment or adjustment, if it is not certified as required by r. 2. 15 S.L.R. 77 = 63 I.C. 238. The mere omission on the part of the decree-holder to certify the adjustment of the decree does not entitle the judgment-debtor to override the period of limitation prescribed by Art. 174 and to apply for certification beyond 90 days of the adjustment. 50 O. 468 ; 88 I.C. 48. Except as provided in the rule, no evidence can be taken to prove an uncertified adjustment. 8 W.R. 319 ; 19 C.L.J. 126 ; 12 A.L.J. 825 ; (1914) M.W.N. 346 ; 13 A.L.J. 666 ; 21 C.L.J. 632 (*contra* in 4 B. H.C. A.C. 120). This rule restricts the rights of the judgment-debtor to prove his payment unless certified as directed by the rule. 21 I.C. 177 = 25 M.L.J. 442. S. 92 of the Evidence Act does not bar the oral evidence to prove an agreement by way of adjustment of a decree, as rule 2 contemplates the taking of evidence to prove the adjustment. 16 N.L.R. 204 = 60 I.C. 316. The last paragraph of O. 21, r. 2 does not preclude the court from considering to what extent the decree had been satisfied by execution of the bond executed by the judgment-debtor in favour of the decree-holder. A.W.N. (1898) 115. A judgment-debtor cannot prove in execution proceedings an adjustment which has not been certified and to certify which he had not applied within the time allowed, (i.e. 90 days) by Art. 174 of the Limitation Act. 22 I.C. 963. Admission of a decree-holder that the decree was fraudulent and that the judgment-debtor was relieved from liability debars his sons from executing the decree after his death, although the decree-holder had not certified the adjustment to the Court. 16 C.W.N. 951 = 14 I.C. 574. Where a transferee of a decree who was only a benamidar for one of the judgment-debtors by whom the decretal amount had in fact been paid applied for execution of the decree, a plea by the other judgment-debtors that transferee, had no title to execute the decree is not barred by O. 21 r. 2 (3). 40 M. 296.

O. 9, R. 9 AND O. 21, R. 2—O. 9, r. 9, does not apply to an application under O. 21, r. 2 (2) and no appeal lies from an order dismissing an application for revival of a petition under O. 21, r. 2 (2) which was dismissed for default. S. 141 does not make O. 9, r. 9 applicable to these applications. 63 I.C. 855.

SUB-R. (3)—A payment or adjustment which has not been certified or recorded as aforesaid shall not be recognised by any court executing the decree.

By any Court executing the decree.—An adjustment of the decree which has not been certified to the court or recorded as such cannot be recognised by the court executing the decree. 8 M. 277 ; 38 A. 289 ; 55 I. C. 669 ; 50 I. C. 331 ; 21 I. C. 926—19 O. L. J. 126 ; 38 A. 204 ; 16 O. 504 ; 12 P. L. R. 1917—39 I. C. 15 ; (1917) M. W. N. 327 ; 11 O. 671 ; 4 Bur. L. T. 162—11 I. C. 780 ; 40 I. C. 889—5 L. W. 664 ; 58 I. C. 123 ; 15 I. C. 899—5 Pat. L. J. 70 ; 35 M. 659 ; 43 B. 240 ; 10 I. C. 625 ; 15 O. 557 ; 20 W. R. 150 ; 7 I. C. 740—12 Bom. L.R. 640 ; 7 W. R. 134 ; 17 M. L. J. 527 ; 21 M. 409 ; 16 O. L. J. 101 ; 1 Bom. 505 ; 25 Bom. L. R. 227 ; 3 M. 113 ; 13 I. C. 21 ; 50 I. C. 956 ; 26 P. R. 1878 ; 10 M. L. J. 213 ; 16 M. L. J. 33 ; W. R. (1864) Mis. 38 ; 9 W. R. 362 ; 51 P. R. 1870 ; 20 O. 32 ; 15 O. L. J. 188 ; 15 O. L. J. 423 ; 23 C. W. N. 320 ; 4 I. C. 402 ; (1911) M. W. N. 473 ; 4 I. C. 200 ; L. B. R. (1893—1901) 621 ; 13 I. C. 63 ; A. W. N. (1890) 68 ; 7 A. 124 ; 17 M. 382. There is no difference whether the adjustment is made before or after the transfer of the decree, 36 M. 357 ; 29 M. 312 33 I. C. 71 ; 4 O. P. L. R. 132. The prohibition is limited to a court executing a decree and does not extend to a case where a court which is not executing the decree is dealing with the matter. 1923 Rang. 44—79 I. C. 278. The clause (3) is imperative. 10 M. L. T. 396 ; 11 I. C. 780 ; 19 O. L. J. 126 ; 23 O. W. N. 320 ; (1911) 2 M. W. N. 473. An unsuccessful adjustment may be recognised by a civil suit except when executing the decree. 16 B. 589 ; 19 B. 204 ; 10 M. L. T. 442. An objection under O. 21, r. 63 that the property has been given to the objector in satisfaction of a decree is not barred under O. 21, r. 2. 13 A. 339.

Fraud in not certifying adjustment.—Whether the conduct of the decree-holder is fraudulent or not in not certifying an adjustment, the court executing the decree cannot recognise it. 16 O. W. N. 923—13 I. C. 63 ; 40 I. C. 889 ; 55 I. C. 899 ; 36 M. 357 ; 63 I. C. 298—15 S. L. R. 77 (*contra* in 45 I. C. 222—5 O. L. J. 92) recognised in case of fraud committed on the Court.

Whether the attaching Court is bound to recognise.—When satisfaction of a decree is not certified to the Court passing the decree, it is not open to another court attaching the decree at the instance of a third person to recognise the satisfaction, of and refuse to proceed with, the execution. 65 I. C. 830—(1922) M. W. N. 189 ; 36 M. 357 ; 42 M. 338 ; 10 L. W. 179 ; 5 L. W. 644. It is only the court executing the decree that is precluded from recognising an uncertified payment or adjustment ; that is, it is only in execution proceedings that the uncertified payment or adjustment cannot be recognised. 135 P. R. 1919 ; 44 P. R. 1906.

EXCEPTIONS :—Uncertified payment or Adjustment saves limitation.—43 C. 207 ; 38 A. 204 ; 21 C. 542 ; 17 A. 42 ; 21 B. 122 ; 26 A. 36 ; 2 I. C. 524 20 O. L. J. 131 ; 35 A. 178 ; 23 C. W. N. 320—50 I. C. 242 ; 52 I. C. 804 F. B. —13 S. L. R. 37 ; 2 A. 191 ; 4 A. 316 ; 7 A. 327 ; 19 M. 162 ; 11 W. R. 232 ; 15 W. R. 459 ; 13 W. R. 40 F. B. ; 15 W. R. 66 ; 11 B. 506 ; 4 Pat. L. J. 159 ; 4 B. L. R. 130 F. B. A contrary view was taken in 16 O. W. N. 396—13 I. C. 424 ; 38 A. 204, that the adjustment cannot be recognised for any purpose whatever. Where several instalments are fixed by a decree and the first instalment is time barred, the decree-holder's waiver of the first default by an uncertified adjustment shortly afterwards does not save limitation to run. 12 A. 569.

The non-certification of an adjustment does not affect the validity of the adjustment.—It may not be recognised by the executing court. 10 M. L. J. 213 10 M. L. T. 442 ; see also 38 A. 204 ; 7 A. 124 ; 13 W. R. F. B. 69 ; 20 W. R. 150 ; 3 C. L. R. 414 ; 4 B. 295 ; 3 A. 533 ; 16 O. 504 ; 13 A. 339 (*contra* in 6 B. 146 ; 18 B. 300 ; 11 B. 6 F. B.)

Cl. (3) does not apply to a suit by the Surety against the judgment-debtor for recovery of payment made in satisfaction of the decree by the former although the payment was not certified, 12 B. 235.

DISTINCTION BETWEEN ESTOPPEL AND OPERATION OF O. 21, r. 2 (3).—Sub-clause (3) enacts a special law for a special purpose whereas S. 115 of the Evidence Act relates to the general law of estoppel and the principle is that a special law overrides for its purpose, the general law. 7 I.C. 940.

Decree-holder's waiver of the right under the default clause.—When a decree directed that the decretal amount shall be paid by instalments and on default the whole balance is to become due and payable, a payment made by the judgment-debtor out of court may be recognised in proof of the decree-holder's waiver of the default even though such payment has not been certified to the court. 19 M 162.

Uncertified payment to one of the joint decree-holders.—When a payment is made to one of the joint decree-holders and not certified, and another applies for execution, the uncertified payment can be taken into account to prove the share of the payee and for deducting such amount from the amount of the decree to be realised in execution. 15 M. 343.

REMEDIES OF THE JUDGMENT-DEBTOR WITH RESPECT TO UNCERTIFIED ADJUSTMENTS.—The judgment-debtor can maintain a suit against the decree-holder to recover damages for breach of the contract represented by the adjustment. 42 M. 338 ; 13 W.R. 69 F.B ; 1 Bur. L.J. 207 ; 1923 Rang. 88 = 70 I.C. 115 ; 10 O.L.J. 351 ; (1917) M.W.N. 359 ; 22 W.R. 298. Such a suit is not barred under S. 47, for the principle question in the suit is not one relating to execution, but to the breach of the contract not to execute the decree and for the damages suffered by the judgment-debtor in consequence of the breach. 23 B. 394 ; 21 M. 409 ; 20 M. 369 ; 10 C. 354 ; 30 A. 464 ; 5 M. 397 ; 13 W.R. 69 F.B. ; 11 I.C. 1 ; 12 P.L.R. 1917 = 39 I.C. 15 ; 30 M. 545 ; 20 M. 369 ; 66 P.R. 1877 ; 4 B. 295 ; 1 Mys. L.J. 108 ; 15 C. 187 ; 83 P.R. 1884 ; 8 M. 277 F.B. ; 20 W.R. 150 ; 25 O 718 ; 13 I.C. 63 ; 4 I.C. 200 ; 8 W.R. 449 ; 9 C. 738 ; 4 B.H.C.A. C. 76 ; L.B.R. (1898—1901) 621 ; 5 B.L.R. 223 ; 6 M. 41 ; 3 A. 533 ; 3 A. 538 ; 40 I.O. 889. A suit is maintainable when based on a private agreement made out of court in satisfaction or adjustment of the decree without the sanction of the court. 6 C.P.L.R. 133 ; 15 B. 419 ; 162 P.R. 1882 ; 54 P.R. 1894 ; 2 M. 611. The judgment-debtor need not wait until execution of the decree against him. His cause of action arises on the presentation of the application by the decree-holder to execute the decree 30 M. 545. In such a case the suit may be at the instance of the judgment-debtor against the decree-holder on the ground of his fraud or negligence. 5 M. 397 F.B ; 6 M. 41 ; 10 C. 354 ; 23 B. 394 ; 8 M.L.J. 51.

Limitation for the suit.—In such cases the filing of the execution petition in itself gives a cause of action, though no money may have been realised, and successive applications may give rise to successive breaches and a fresh cause of action. If money is subsequently realised, that will give a fresh cause of action as a further breach of the covenant. Such a suit is governed by Art. 115 and not Art. 120 of the Limitation Act. 48 I.C. 810 = 36 M.L.J. 176 ; 10 I.C. 462 = 21 M.L.J. 518 ; 1 Mys. L.J. 178.

Jurisdiction of the Small Cause Courts.—A Small Cause Court has jurisdiction to entertain a suit for damages sustained in consequence of a decree-holder fraudulently omitting to certify to the court the payment made by the plaintiff. 9 W.R. 210.

In the Panjab, a suit for a declaration that the decree has been satisfied and is not capable of execution and for restraining the decree-holder from executing the same is

maintainable. 16 P.R. 1910 ; 79 P.R. 1892 ; 330 P.L.R. 1913 ; 42 P.R. 1914 ; 284 P.L.R. 1919 ; 79 I.C. 125. But see now 3 Lah. 319 F.B., a suit for a declaration that a decree has been fully satisfied and is incapable of execution is barred under S. 47. The other view is that while execution proceedings are pending and the decree has not been fully executed and certified as adjusted no suit can be maintained for staying execution by an injunction or that the decree is incapable of execution. 22 I.C. 963 P.O. ; 20 A. 254 ; 28 I.C. 468 ; 15 N.L.R. 158 = 50 I.C. 956 ; 11 B.6 F.B. ; 11 M. 469 ; 10 B. 155 ; 47 P.R. 1881 ; A.W.N. (1889) 95 ; 31 C. 480 ; U.B.R. (1913) 4th Qr. 191 ; 5 M.L.J. 140 ; 15 M. 302.

Limitation.—Such a suit held maintainable in the Punjab, is governed by Art. 120 or 97 or 115 of the Limitation Act and time begins to run from the date when the payment of the decree is repudiated. 330 P.L.R. 1913 = 21 I.C. 557.

Criminal proceedings.—The prohibition contained in O. 21, r. 2 (3) against the recognition of an uncertified payment or adjustment is confined to Civil Courts executing decrees and does not extend to Criminal Courts. If after satisfaction of the decree out of court, the decree-holder applies for execution of the decree and omits to state that the full amount of the decree has been paid he is guilty under Ss. 191 and 193, I.P.C., for making a false statement. 16 C.W.N. 923 = 13 I.C. 63 ; 10 B. 288 ; 9 M. 101 ; 16 C. 126 ; 7 P.R. 1885. In such a case if the decree is executed the decree-holder is further liable under S. 210, I.P.C., for fraudulently causing a decree to be executed after it has been satisfied, 9 M. 101 ; 10 B. 288. O. 21, r. 2 puts on the party, applying for executing the obligation of stating any adjustment between the parties after the passing of the decree. 2 M. 216. A conviction under S. 210, I.P.C., cannot be had until the judgment-debtor had appeared and had either made no objection or had made an objection which had been formally overruled. The execution of the decree did not begin till the judgment-debtor appeared. Before that the decree-holder did not execute his decree, the only result of his application being to issue a notice calling upon the judgment-debtor to show cause why the decree should not be executed. 88 P.L.R. 1902. In criminal cases, proof of the uncertified payment may be admitted by a Criminal Court. 10 B. 288 ; 16 C. 126 ; 9 M. 101 ; 4 M. 325. The fact of certification of payment in the execution petition does not constitute an offence, under Ss. 197, 198, I.P.C., if the certification is false. 33 I.C. 416 = 20 C.W.N. 520.

SUIT BY THE DECREE-HOLDER ON THE BASIS OF AGREEMENT OF ADJUSTMENT.—When a decree is adjusted out of court by the judgment-debtor promising to pay a certain amount within a certain time and executing a bond for the same, the decree-holder can bring a suit for recovery of the amount promised. 22 B. 693 ; 27 B. 96. **Appeal.**—See Chapter IX.

DECREEES SATISFIED OR ADMITTED TO BE SATISFIED.—A decree-holder is not entitled to put in an application for further execution of his decree after, in execution of a previous decree, the full amount stated in that application had been paid and the decree admitted to be fully satisfied and so entered by an order of the court. The proper course, if there had been any mistake, would be for the decree-holder to come in for a review. 52 I.C. 148 ; 7 W.R. 142. A part performance of the decree does not disentitle the decree-holder to execute it. 16 I.C. 972 = 16 C.L.J. 101.

RIVAL FINAL DECREES.—When there were two cross-suits for possession of the whole of an estate and one-third of the estate respectively and the suit for the whole estate was finally decreed by the High Court and the plaintiff put in possession, and the suit for the one-third share finally decreed for the opposite party by the Privy Council ; held, in an application for execution by the holder of one-third share, that the decree of the Privy Council can be executed, notwithstanding that it involved the disturbance of possession obtained by the claimant of the whole estate under the High Court's decree.

which had become final. The decree of the Privy Council in this case was later in date, and the claimant of the whole estate should, if he desired to be secured in possession, have pleaded the decree of the High Court in the cross suit when the appeal in connection with the one-third share was before the Privy Council. 1 A. 456 (F.B.).

EXECUTION OF DECREES AFTER AN ORDER OF AMENDMENT UNDER O. 20, R. 11.—After a decree is passed, no order can be made for the payment of decretal amount by instalments; nor can payment be postponed except under O. 20, r. 11, which provides—

After the passing of any decree for the payment of money, the Court may, on the application of the judgment-debtor and with the consent of the decree-holder, order that payment of the amount decreed shall be postponed or shall be made by instalments on such terms as to payment of interest, the attachment of the property of the judgment-debtor, or the taking of the security from him or otherwise as it thinks fit.

APPLICATION.—The rule applies to money decrees only, 5 B. 604. It is applicable to the case of a supplementary decree in a mortgage suit under O. 36, r. 6, because such a decree is a personal decree for the payment of money within the meaning of O. 20, r. 11, and the Court has jurisdiction to order instalments. 15 C.W.N. 1093 = 11 I.O. 796. For other instances of money decrees, see *infra*.

SUCH AN ORDER IS VIRTUALLY AN ORDER AMENDING THE DECREE.—An order postponing execution of a decree or ordering payment by instalments under O. 20, r. 11 is virtually an order amending the decree and an application made within 12 years of the date when the said order is to take effect is not barred under S. 48, C.P.C. 34 I.O. 393. Hence after such an order, the decree is not to be executed. It is replaced by the order under O. 20, r. 11 and it is this order that can be executed. The order of the Court under this rule relates either to (i) the postponement of payment, or (ii) the payment to be made by instalments. Other conditions may be attached to such payment which are only discretionary with the Court.

APPLICATION AND CONSENT.—There should be an application by the judgment-debtor and consent of the decree-holder should be obtained before making an order under this rule.

COURT.—An order under this rule can be made only by the Court that passed the decree. 40 M. 233.

LIMITATION.—The period of limitation for an application under this rule is governed by Art. 175, Limitation Act. 96 P.R. 1900.

APPEAL.—There is no appeal from an order refusing to allow instalments, 6 Bur. L.T. 193 = 20 I.O. 673.

WHAT AMOUNTS TO AN ORDER UNDER THIS RULE.—Where the court endorsed the expression "recorded" on an application for postponement of a decree signed by all the parties, it amounted to an order granting the application and amending the decree in terms of the prayer. 34 I.O. 393. Mere agreement of the parties without its

being recognised and sanctioned by order of the Court does not amount to an order under this rule, and the limitation for execution will therefore run from the date of the original decree. 14 O. 348. A judgment-debtor, on being arrested, asked for 15 days' time to pay the decretal amount, to which the decree-holder consented ; and the Court passed an order to the effect, " let the petition be filed." It was held that the order did not amount to one for payment of money to be made at a certain date. 16 O. 16. Where a judgment was passed on 21st July, and, on the 24th, an arrangement by the parties to pay the decretal amount by instalments was filed and explained to the judgment-debtor who accepted the terms but no formal orders were passed under O. 20, r. 11 and the formal decree was drawn up on 25th according to the original judgment, it is a good order under O. 20, r. 11 for the purposes of execution. 5 O.L.J. 25.

PRIVATE ARRANGEMENT AFTER THE DECREE.—Where after the passing of a decree the parties come to a private arrangement as to discharge the obligation under the decree, the decree will merge in the agreement which cannot properly be enforced in execution but only by a separate suit. 51 P.R. 1885 ; 23 W.R. 129 ; 195 P.R. 1882. But when an agreement is entered into by the parties, not in supersession but in pursuance of a decree as to the mode of its execution, the decree will be held to be still subsisting, and the case cannot, on account of the agreement, be struck off the file till the decree is satisfied. 195 P.R. 1882. When a suit is dismissed as the result of a compromise, the decree passed by the Court is not capable of execution. 81 I.C. 459 = 1924 Cal. 49.

EXECUTION OF CONSENT DECREES.—The court executing a compromise decree is bound to give effect to such compromise subject to the limitations indicated by O. 23, r. 3, C. P. Code. So long as the requirements of the rule are satisfied the compromise becomes a part of the decree itself and can be given effect to in execution of the decree, at least as between the decree-holder and the judgment-debtor. When such a decree has been passed on a compromise duly arrived at between the parties and sanctioned by the court executing the decree, neither the decree-holder nor the judgment-debtor can resile from the position which he deliberately took up in the matter of the compromise. 11 A. 228 (29 P. R. 1508 ; 23 P.L.R. 1901). Ordinarily a consent decree can be enforced in execution proceedings as an ordinary decree. Once a compromise decree is passed with reference to the rights of the parties to the suit, their further remedy is by way of execution and not by a separate suit. 153 P. R. 1919 ; 40 M. 177 ; 53 I. O. 892 = 30 C. L. J. 118. It is binding till set aside. 79 I. C. 891 ; O. 23, r. 3. deals with the consent decrees and when they can be passed.

O. 23, r. 3—When it is proved to the satisfaction of the court that a suit has been adjusted wholly or in part by any lawful agreement or compromise or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the court shall order such agreement, compromise or satisfaction to be recorded and shall pass a decree in accordance therewith so far as it relates to the suit.

This rule requires that the compromise should be lawful and that the decree should not comprise those terms of the compromise that do not relate to the suit

So far as execution of the decree is concerned the question is whether a consent decree based on an unlawful agreement or embracing the terms of the compromise that do not relate to the suit, can be enforced in execution proceedings.

WHERE A COMPROMISE DECREE IS BASED ON AN AGREEMENT THAT IS NOT LAWFUL.—A civil court has no jurisdiction to pass a decree on a compromise unless it means a lawful compromise. When the terms of a compromise are opposed to public policy, the decree which embodies the unlawful terms of the compromise is not operative and cannot be enforced. 26 M. 31 ; 31 B. 15 F.B. It is open to the executing court to consider what the rights of the parties, equitable or otherwise, are, which follow from the contract embodied in a compromise decree. 24 C.W.N. 545. So far as a decree embodies unlawful terms of a compromise it is inoperative and will not be enforced. 26 M. 31 ; 24 M. 265 ; 20 N.L.R. 1=78 I.C. 357. An agreement or compromise as regards the genuineness and due execution of a will, if its effect is to exclude evidence in proof of the will, is not lawful, being against public policy. 31 C. 357. An agreement to abide by a decision of a certain fact is lawful as it is capable of enforcement, 23 C.L.J. 482=34 I.C. 220. An agreement to abide by a sum to be fixed by a party in the suit and acquiescence in the sum so fixed is lawful. 8 S.L.R. 91=25 I.C. 995. An agreement between the parties to a suit that it should abide and follow the result of another suit between the same parties is valid and lawful. 24 M.L.J. 356=51 I.C. 540. An agreement to refer a dispute to arbitration without the intervention of the court falls under O. 23, r. 3. 37 B. 639. An agreement to refer to arbitration with an award thereon falls under O. 23, r. 3, but not a bare agreement between the parties to refer. 36 M. 353 ; 55 I.C. 716 ; 30 C. 218 ; 38 B. 687. An award made without the intervention of the court during the pendency of a litigation cannot be regarded as an adjustment under O. 23, r. 3, if it is not consented to and any attempt to enforce it by one of the parties is precluded by reason of S. 89, C.P. Code, 3 Lah. L.J. 161 ; 40 B. 386. The proceedings under r. 17 of Sch. II, C. P. Code, can be compromised by amending the award and the parties are entitled to get a decree based on the amended award. 38 P.W.R. 1910 ; 27 P.W.R. 1914=69 P.L.R. 1914. In a suit on a pro-note, the agreement between the parties to abide by the decision of the Munsiff in a suit for the cancellation of the same is not lawful. 37 M. 409. In a partition suit, where the extent of the property available for partition is being litigated, a compromise purporting to appoint trustees on behalf of the plaintiff to determine and obtain the plaintiff's share from the defendant and hold it in trust for him is not a valid adjustment of the suit. 8 S.L.R. 197=27 I.C. 369. A compromise is not unlawful within the meaning of O. 23, r. 3 merely because it deals with matters not included in the claim. 78 P.R. 1917. A compromise is not unlawful merely because the parties do not get the shares to which they would be entitled under their personal law. 55 I.C. 716. A penal clause in a compromise deed is not enforceable. 24 C.W.M. 545. The power of the court to grant relief against the enforcement of a penal clause is not confined to contracts between the landlord and tenant, but extends to compromise decrees also. 26 M.L.J. 488 ; (1914) M.W.N. 92 : 2 L.W. 635=30 I.C. 248. It is competent to a court executing the decree to grant relief against forfeiture. (1916) 2 M.W.N. 327=32 I.C. 697. An executing court can go behind the terms of a compromise decree and declare a clause to be penal under S. 74 of the Contract Act. 32 I.C. 697. The terms of a compromise not embodied in a registered document but incorporated in the decree, passed in a suit for ejectment, according to which the defendant is to hold the land as an under-raiyat of the plaintiff and is not to be liable to ejectment from his under-raiyat holding, are binding on both the parties. 47 I.C. 485 ; 57 C. 751. An agreement to part with a portion of a right to the Arobik Miras in a temple in favour of the plaintiff is opposed to public policy. 38 M. 850. An agreement by the parties to a suit to abide by a sum to be named by their pleaders is not a lawful adjustment until that sum is named and the parties inform the court that they are

willing to have a decree for the sum so named. 6 S.L.R. 166=19 I.C. 450. A compromise of a suit to avoid criminal prosecution is unlawful. A.W.N. (1883) 145. An agreement which professes to bind the defendant to pay a sum which cannot be lawfully recovered is not a lawful agreement. 104 P.R. 1880. An agreement by a Mohammadan of the Hanafi School to relinquish or bind his chance to succeed to an estate, is void and unenforceable. 2 I.C. 865. An agreement by which the plaintiff makes some concession and the defendant makes a concession with respect to his costs in the suit, is a lawful one. 37 I. C. 421. An agreement, whereby the plaintiff and his younger brother were to execute a sale deed within a week conveying the lands in the suit to the defendant for a certain sum and in default the suit was to stand dismissed, is a lawful agreement. 17 M.L.J. 37. A compromise by the parties before a local commissioner appointed to investigate the case, is not lawful if the parties have the option to repudiate it. 27 P.R. 1914. A resolution adopted at a meeting of the shareholders of the plaintiff company for the purchase of a factory from the defendant in part payment of his debts is not a lawful adjustment. 45 M.L.J. 763=1923 P.C. 178. A consent decree based on a compromise by which the holder of the office attached to a temple agrees to sell the office, is inoperative, being unlawful, as against public policy and the executing court should refuse to sell the same. 26 M. 31. By private agreement converted into a decree, parties cannot empower themselves to that which they could not have done by private agreement alone (*Ibid.*) A compromise in a suit which comes under the Deccan Agriculturists Relief Act, 1879, is not bad in law because it is made without compliance with the provisions of S. 153 of that Act. 37 B. 614 F.B. Where a decree of a Settlement Court was based on a compromise which contained restrictions as to the alienation, such conditions were void and unenforceable. 10 O.C. 136. An agreement to the effect that if food prepared by one of the parties was eaten by the other, the suit might be decreed, the issue being as to the legitimacy, is not a lawful one as it depends on a future contingency. 78 I.C. 540=27 O.C. 157; 79 I.C. 353=22 A.L.J. 301. When all the terms are not settled by the compromise and the consent of both the parties is not signified, the compromise is unlawful. 9 I.C. 426. Where a dispute arose as to the terms of a compromise and it fell through, the compromise is unlawful. 9 I.C. 365. An agreement by an administrator to grant a permanent lease without the leave of the Court appointing him as such under S. 90 (3) of the Probate and Administration Act is not a lawful agreement. 11 C.L.J. 346. A compromise by which the defendants agree to a mortgage decree being passed against them even in respect of the portion of the claim not secured by the mortgage, is a lawful one. 17 M.L.J. 200. An agreement by which some of the parties to a suit harass the other parties to the suit is unlawful. 77 I.C. 874=O. & A.L.R. 415. Where a minor is not a party to the suit and has not been heard and represented before the Court and an agreement is entered into by the parties as to his rights and liabilities, the agreement is unlawful. 5 I.C. 432.

WHERE A COMPROMISE DECREE EMBRACES TERMS OF THE COMPROMISE THAT DO NOT RELATE TO THE SUIT. — Such terms can be enforced in execution of the decree. 9 A. 229; 30 M. 421; 26 M. L. J. 331; 38 M. 959; 23 P.R. 1903; 2 Pat. L.J. 673; 27 M.L.J. 388. The reason is that it is not competent to the party against whom the decree is sought to be executed, to object to the decree on the ground that it contains matters extraneous to the suit. The objection can be taken by way of appeal under O. 43, r. 1 (m) from the order recording the compromise and it cannot be taken in execution of the decree. 27 M.L.J. 388. Even if the agreement relates to the property not subject of the suit and could not form part of the decree, once it has been so made a part, the person bound by the decree cannot object to that part as being not binding on him. 10 O.L.J. 448=79 I.C. 685. A separate suit for the recovery of the access

covered by the decree is barred. 9 A 229. It is barred by S. 47, Civ. Pro. Code, as the question relates to the execution of a decree. (*Iidd*) *contra* in 78 I.O. 317. A compromise decree including matters covered by the suit as well as matters extraneous to the suit can be executed only to the extent it relates to matters in the suit and not with regard to matters outside the scope of the suit. 78 I.O. 317. A consent decree wrongly passed owing to some legal or technical defect is not a nullity. The Court has jurisdiction to pass a right as well as a wrong decree; and if it decides wrongly, the wronged party can only take the course prescribed by the law for setting matters right. 32 M.L.J. 434=51 I.O. 439. Though the consent decree or order is a mere creature between the parties it is still an order of Court and hence is executable, 44 C. 789. When a compromise decree reserves a right to a stranger, he is not entitled to execute, but can only sue on the decree. 37 I.O. 133. A party to a consent decree which the Court had jurisdiction to pass or any one deriving title under him is estopped from going behind the terms to which he has voluntarily submitted, on the ground that the decree was wrongly passed. 51 I.O. 439. A contrary view is held by the High Court of Calcutta. It is held that such terms cannot be enforced in execution of the decree; but they may be enforced as a contract by original suit. 34 C. 456, 463; 5 C.W.N. 485; 62 I.O. 653. See also 47 C. 485 P.O.; 36 C. 193; 1 C.L.J. 388. A similar view is held in 37 I.O. 397, where it is held that the decree-holder could not proceed against the property in execution of the compromise decree unless he brings a proper suit, on the ground that neither the mortgage bond, nor the subsequent compromise petition nor the decree based on the compromise etc. contained any provision as to the execution of the decree by attachment and sale of the property mortgaged. In the Punjab it is held that a decree based on a compromise in so far as it relates to property extraneous to the suit is without jurisdiction and inoperative. 31 P.R. 1919; 78 P.R. 1917. When during the execution proceedings the parties agreed to refer the matter to arbitration and an award was made and a formal decree passed thereunder, it was held to be capable of execution and the propriety of such a decree could not be called in question by the judgment-debtor. 11 I.O. 457=16 C.W.N. 34. Where a Court passed a decree in accordance with a compromise arrived at by the parties and certain Hundis were given as further additional securities merely, which were subsequently dishonoured on presentation, held that the parties could enforce their rights to the money by proceedings in execution under the compromise decree without having to sue on the Hundis. Where a compromise decree incorporates, *in extenso*, the terms of a compromise, adopts them, and makes them executable only so far as they relate to the suit, the terms which are omitted by the decree are not executable with the decree. 30 I.O. 263=2 L.W. 608.

COMPROMISE IN APPEAL.—The rule as to compromise applies in the case of appeal as well, 6 Lah. L.J. 261.

COMPROMISE IN EXECUTION PROCEEDINGS.—Nothing in O. 23 applies to any proceedings in execution of a decree or order. [O. 23, r. 4]. The proper rule applicable in such a case is provided in O. 21, r. 2, and any compromise out of Court not covered by O. 21, r. 2 cannot be enforced under O. 23, r. 3. But it must be noted that the rule of estoppel is not affected by this rule. If an application for execution is dismissed on the basis of a compromise proceeding for a particular method of satisfaction and also for a fresh application if the compromise is not carried into effect, the judgment-debtor cannot object to the entertainment of a fresh application on his failure to carry out the terms. 13 I.O. 81.

COMPULSORY REGISTRATION AND COMPROMISE OF THE SUIT.—So far as the stipulations and provisions of a compromise are incorporated in the decree, they do not require registration, whether they are extraneous to the suit or not. 20 A. 171;

28 A. 78 ; 19 I.C. 551 ; 3 Pat. L.J. 42 ; 3 Pat. L.J. 255 ; 78 P.R. 1917 ; 33 M. 102 ; 47 C. 485 P.O. ; 43 M. 488 F.B. ; 57 I.C. 751 ; *contra* was held in 20 C.W.N. 210 ; 36 C. 199 ; 36 M. 46 ; 31 P.R. 1919. But these rulings must now be judged in the light of the Privy Council ruling. 47 C. 785 P.O. The provisions of the Registration Act apply to terms in the compromise which are not incorporated in the decree. 29 M. 365 ; 22 M. 508 ; 36 M. 46 ; 32 A. 206. Where a document requires registration but is not registered, the defect may be cured by the conduct of the parties in continuously acting upon it. 42 C. 801.

EXECUTION OF THE DECREE WHICH IS INCAPABLE OF EXECUTION OR WHICH BECOMES INCAPABLE OF EXECUTION BY SUBSEQUENT EVENT.—

When subsequent to the passing of a decree for ejectment under S. 78, Act X of 1859, the tenant paid and the Zamindar accepted rent, such receipt of rent rendered the decree impossible of execution. 7 W.R. 142. An objection that a decree for ejectment previously obtained has become incapable of execution by reason of events subsequent can be properly taken in execution of the decree. 44 C. 954.

"Incapable of execution".—The expression means that there must be some inherent defect in the decree itself which makes it incapable of execution. (1917) Pat. 263=43 I.C. 666. A decree incapable of execution cannot be executed. 18 C.W.N. 910. When a decree is passed giving a life estate to the daughter and she dies, her sons cannot execute the decree after her death as legal representatives. 11 A.L.J. 454=19 I.C. 375. Where a decree directed the payment to a minor of a certain amount of income every year, and the minor died during his minority, his heirs were not entitled to recover in execution proceedings subsequent allowances after his death. 24 B. 182. Where during the execution proceedings the parties agreed to refer the matter to arbitration and an award was made and a formal decree framed thereunder, it was held to be capable of execution and the propriety of such a decree could not be called in question by the judgment-debtor in execution. 11 I.C. 457=16 C.W.N. 34. Where a plaintiff withdraws from a suit with permission to bring a separate suit, there is no decree capable of execution. 9 A. 690. A decree ordering the defendant to pay the plaintiff certain specific moveable property of the kinds enumerated in the decree up to the value of Rs. 30,000, or to pay that amount, is capable of execution, the construction being that the defendant should deliver to the plaintiff all moveable properties of the kind described up to Rs. 30,000, and if he should fail to do so, to pay Rs. 30,000 or such portion thereof as would be equal to the value of the properties not delivered. 64 P.R. 1890. When a decree was against the Deputy Commissioner as Manager of the Court of Wards and it ordered that the decree should not be executed by recovery from the Deputy Commissioner personally or from the estate of the ward under his management, the decree can be executed against the estate after its release from the management of the Deputy Commissioner. 9 I.C. 335=14 O.O. 6. Where the decree merely states the shares in the immoveable property to which the plaintiffs are entitled and leaves these as well as all other necessary figures to be worked out at a subsequent period, the decree is not final or executable. 2 M.L.T. 265. When the shares of defendants are not ascertained in the decree for partition the defendants cannot execute the decree as to their interests. A.W.N. (1884) 215. A decree not specifying relief cannot be executed. 21 I.C. 615. Where a decree directed possession on payment of a certain sum to be ascertained there is no executable decree. 36 A. 322. Where the shares of the decree-holders were not specified, the court was not entitled to go behind the decree and to ascertain the shares, and the decree being vague, is not capable of execution. 13 A.L.J. 428=29 I.C. 213. A decree does not become incapable of execution within the meaning of para. 172 of the Oudh Civil Digest merely because the attempt to execute it has proved unsuccessful. The court to

which a decree is sent for execution is competent to persevere with the execution until it is made to appear either that satisfaction has been obtained or that execution is no longer possible. 21 O. C. 261=48 I. C. 722. Where the amount due under a former decree which was set aside was partly recovered in execution of a second decree *held* that the balance of the first decree could not be recovered from the judgment-debtor in execution of the second decree and that no acquiescence in former illegal proceedings could render the illegal execution valid. 1 A. 368. Where a decree passed under S. 88 of the T.P. Act directed that if the decree was not satisfied within two months, the property should be sold, execution of it could not be allowed before expiry of such time. 7 A 194. Where a decree for redemption of a Malabar Kanam provided that the plaintiff be put in possession of land upon payment by plaintiff to defendant of the mortgage amount and the value of the improvements to be determined in execution, the decree became a complete decree, on the date on which the court determined the value of improvements payable by the decree-holder. An application made to execute the decree within three years from the latter date would be within time. 8 M. 37. Where a decree in a suit upon a bond against the heirs of deceased obligor awarded to the plaintiff the amount of the bond from the property of the obligor and declared that the defendant be released from the claim in the suit, an order for execution of the decree was set aside on the ground that the decree did not warrant the issue of an attachment since it was not against any person. A suit was maintainable by the plaintiff upon the decree recovered in the former suit, there being no other means of enforcing the former decree or recovering his debt. Marsh 611. It is necessary to prove the exact contents of the decree which is alleged to have been passed before ordering execution. 1943 R. 113. A decree passed in conformity with the provisions of S. 52 of Act VIII of 1869 (Landlord and Tenant Procedure—Bengal Act) and allowing fourteen days for the payment of arrears of rent due upon a Mokurari lease and interest thereon, is a good decree. 7 C. 566. When a decree-holder is entitled to execute his decree only on a default as provided in the decree he is not debarred from executing the decree when the default occurs for the first time merely because it occurs after 20 years. 14 L.W. 632. The fact that the decree is difficult to execute does not render it incapable of execution. 63 I.C. 975 (L.). It is competent to a judgment-debtor at the execution of the decree to object that the decree has been altered behind his back and was therefore not capable of execution. 8 A. 377. Where a plaint does not contain details of the properties claimed, which, however, are given in a separate paper and the decree also makes no mention of such details, a court executing the decree will not be justified in reading the contents of the separate paper into the decree and awarding the decree-holder possession of the properties mentioned therein. 6 A. 30, but see 18 A. 344. There can be no complete decree until there is an enquiry into improvements and it cannot be reserved for execution even with the consent of the parties. 3 M. 382 F.B. In a partition decree until the exact portion of the plaintiff's share was indicated and a final decree passed accordingly as contemplated by O. 20, r. 13 there is no decree which the court can execute. Applications towards effecting a partition before such final indication would constitute proceedings in the suit itself and not in execution. 47 P.R. 1906. A decree given under S. 78 of the Bengal Rent Act, X of 1859, need not declare that 15 days' time should be allowed to the tenant, though it must specify the amount of the arrears. Payment of this with costs and interest as decreed within 15 days *ipso facto* stays execution. 1 N. W. P. 89. When a suit is dismissed as the result of the compromise, the decree passed by the court is not capable of execution. 1924 Cal. 49=81 I.C. 459. In a suit against two sets of defendants, the court of first instance decreed it against the second set and dismissed it against the first set. On appeal by the second set, the appellate court passed a decree against the first set of defendants though they were not parties to appeal. *Held* that the decree could not be executed against the first set of defendants. 13 A.L.J. 196=27 I.C. 804.

Conditional decrees.—A decree directed the judgment-debtor to execute a conveyance on payment by the decree-holder of a certain sum of money. The decree-holder could not pay the amount within the time extended by the court, *held* that the judgment-debtor was not bound to execute the conveyance. 31 I.O. 457.

INCOMPLETE AND AMBIGUOUS DECREES.—When a decree cannot be executed literally, it cannot be executed at all. But it is open to a court executing a decree to construe it in the light of the plaint and the judgment if there is any ambiguity in the decree. 33 I.O. 561; 31 I.O. 478=(1915) M.W.N. 1944. Where two descriptions of the same subject-matter conflict with each other, or when two parts of the same description are in conflict, that which is more certain, stable and the least likely to have mistaken or inserted inadvertently, must prevail, if it sufficiently identifies the subject-matter. 17 O.C. 256=25 I.O. 204. An executing court can go behind a consent decree and look at the terms of the compromise in accordance with which the decree was passed in order to properly understand what the decree was. 21 C.W.N. 835=37 I.O. 916. When a decree is incomplete and ambiguous, it is not the duty of the executing court to complete it and give a definite meaning to it. 29 I.O. 213; 34 I.O. 344. A decree cannot be varied in execution proceedings. 3 Bom. L.R. 318; 18 B. 495. A decree that does not specify relief is incapable of execution. 21 I.O. 615. Where a case is partly decreed and partly remanded for further investigation, the period of limitation runs from the date of the last judgment by which the whole decree becomes final and not from the date of the incomplete decree. 5 W. R. Mis. 6. When a court has to execute a decree which is badly drawn up and ambiguous, it is permissible to refer to the pleadings in the suit in which the decree was passed in order to ascertain the precise meaning. 5 A.L.J. 742. The decree passed in a suit for partition of non-revenue-paying property was to the effect that the plaintiff was entitled to get possession of 1/5th share of the property set forth in the plaint, but it did not go on to specify and define the particular 1/5th share allotted. The decree was held in this shape not capable of execution. A.W.N. (1903) 187. A plaintiff in his suit made two claims, first, for a declaratory decree as to his right of possession of certain lands, and, secondly, for possession of other lands with mesne profits. The Court decreed both claims but did not in its decree specifically allude to the claim for mesne profits. The decree-holder was held competent to execute his decree in respect of the mesne profits also. A.W.N. (1896) 54. When a pre-emption decree is silent as to the effect of non-payment within the time fixed in the decree, the decree may be interpreted as to have the effect of dismissing on default of the plaintiff paying the amount within the time fixed. A.W.N. (1888) 4. Where a decree directs demolition of a portion of a wall the decree is capable of execution by taking evidence as to identity of the subject-matter. 14 I.O. 588. Where the amount of mesne profits was left undetermined by the decree and the parties entered into a compromise that the decree as to mesne profits should be executed against a particular plot of land and a decree was passed in accordance with the compromise held that the decree cannot be executed in any manner other than that specified in the compromise, unless it is shown that the method of execution specified in the compromise has become impossible. 33 M. 78. An executing court will execute the decree as it finds it and not as the parties understand it. 29 M.L.J. 219=30 I.O. 357. Where a decree is incomplete and ambiguous it is not the duty of the executing court to complete it and to give it a definite meaning. 13 A.L.J. 448=29 I.O. 213; 34 I.O. 344. Where a decree is to the effect that against A, a part representative of the deceased, the property is declared *wakf* and at the same time there is a declaration in the same decree that a portion of the property could be sold as against another representative *held* that the latter part of the decree is irreconcilable with the former which made the whole decree incapable of execution. 18 C.W.N. 910=20 I.O. 790. A decree provided for payment by instalments, but the amount of the instalments

was not fixed. The executing Court acts irregularly in fixing the amount although it is not illegal. 46 P.R. 1881.

Deficiency of Court-fees.—When a decree has been properly drawn up on an award the executing Court cannot refuse to execute it on the ground that Court-fees have not been paid on the decree. 79 I.C. 489. A direction to pay extra Court-fees set forth in the concluding part of a decree does not form any part of the decree. It is a surplusage and does not make execution of the decree conditional upon the payment of the extra fees within the time named by it. 30 M. 32.

PRELIMINARY DECREES.—When there are two decrees in a suit, a preliminary and a final decree (or the decree absolute) the final decree is the complement of the preliminary decree and for the purposes of S. 48, O. P. Code the two together must be taken to be a single and indivisible decree, the date of which is the date of the final decree or decree absolute. This is so even if the preliminary decree is based on a compromise. 33 I.C. 180=23 O.L.J. 579; 46 B. 761. A preliminary decree passed under O. 34, r. 4, is not executable. 32 I.C. 981. Until a final decree is made there is in fact no decree capable of execution. 21 C. 818; 22 C. 931; 33 B. 273; 8 O.W.N. 102. The final decree based on a preliminary decree which latter decree has been itself reversed, has no life in it and the executing court is competent to determine whether the decree sought to be executed is in force or not and to refuse execution if it has been suppressed. 17 O.W.N. 868=19 I.C. 630; 37 M. 29; 37 M. 455; 36 A. 532 F.B. A preliminary decree in a mortgage suit is not capable of execution. 80 I.C. 716. Applications for an order absolute for sale under S. 89, T.P. Act are not applications for the execution of the decree. 24 M. 412; 8 O.W.N. 102; 6 Bom. L.R. 1043; 12 A. 539; *contra* in 30 A. 248; 28 M. 473; 16 M.L.J. 503=1 M.L.T. 294. Time begins for the date of the preliminary decree in a mortgage suit. Execution can be applied for on the basis of a preliminary decree. 16 A. 270; 39 M. 544 (An order absolute is obtained in execution proceedings). A foreclosure decree passed under S. 89, T.P. Act must be made absolute under the provisions of S. 89 before execution, otherwise it is incapable of execution. 8 O.C. 75; see 12 A. 539. A suit is considered to be pending after the preliminary decree but before a final decree. 82 I.C. 452; 39 M. 488. Where a preliminary decree for possession of immoveable property awarded mesne profits subsequent to suit, the Court had no jurisdiction to entertain execution applications for ascertainment of mesne profits. 46 M.L.J. 46=79 I.C. 635. An application for realisation of mesne profits is within time if brought within 3 years from the date of the order determining the amount of mesne profits. 4 C. 629. A decree was passed in terms of a compromise directing the judgment-debtor to pay the debt due to the decree-holder by certain specific instalments, providing also that in case of default the property mortgaged to the decree-holder would be sold, *held* that the decree having been passed in terms of the compromise was a final decree and not a preliminary decree and was capable of execution. 55 I.C. 816. Proceedings for the assessment of mesne profits are in continuation of original suit. No operative decree can be passed until the mesne profits are ascertained or inquiries made in accordance with the directions given in the interlocutory decree. Therefore mesne profits are ascertained in the suit itself and not by way of execution. 39 C. 220. Mesne profits awarded by the decree must be deemed to be accruing only from the time the final judgment is passed so that limitation does not begin till then. 12 I.C. 272=(1911) 2 M.W.N. 258. An order absolute is entirely for the benefit of the mortgagor and if he deliberately waives his right in this behalf, it is not open to him subsequently to turn round and contend that the decree-holder is not entitled to execute the decree without an order absolute. 10 I.C. 536.

DECREES AGAINST OR IN FAVOUR OF DEAD PERSONS.—A decree or order passed after the death of the defendant and before his legal representative was brought

on the record is a nullity. 26 B. 317 ; 13 A. 58 P.O. ; 17 A. 478 ; 38 M. 682 ; 16 I. C. 58 ; 20 I. C. 506. Objection can be taken in execution proceedings. 38 M. 682 ; 50 I. C. 529 F.B. ; 21 A. 316 ; 247 P.L.R. 1911=11 I. C. 869 ; 16 A.L.J. 327. But judgment may be pronounced notwithstanding the death of either party between the conclusion of the hearing and the pronouncement of the judgment and it shall have the same force as if it had been passed before the death took place. O. 21, r. 6, O. P. Code. Also see 21 B. 314 ; 19 C. 513 ; 19 C. 538 P.O. ; 19 B. 807 ; 21 A. 314. The reason is that in such a case nothing is left to be done by the parties from the moment the judgment is reserved and any delay is the delay of the court (*ibid.*) If a decree is passed against a dead person the executing court can treat it as a nullity. 45 A. 198. But where a decree for sale is objected to on the ground that it was based on a preliminary decree passed against a dead person, the executing court cannot treat the decree as a nullity, though it might be a good ground for setting aside the decree (*ibid.*) The executing court can entertain an objection that the decree has been passed at a time when the plaintiff or the appellant was dead and no representative of his had been impleaded within limitation although no plea to this effect had been taken at the time of appeal. 43 A. 328. A decree against the estate of a deceased person with a wrong representative on the record is a nullity and an execution sale held in pursuance of it is invalid. 18 I.C. 381=15 Bom. L. R. 41. An executing court cannot go behind a decree. When after a preliminary decree is passed, the mortgagor dies and without bringing his legal representative on the record a final decree is passed the decree is a nullity and its validity can be impeached in a subsequent suit for declaration and injunction, 16 L.W. 314=43 M.L.J. 293 ; 43 M. 675 ; *contra* in 44 C. 627.

DECREE AGAINST UNREPRESENTED MINORS AND LUNATICS.—Every order and judgment, however erroneous is good until discharged or declared inoperative and the executing court cannot enquire into the validity or propriety of the decree. A judgment against a person who was not *compos mentis* at the time of the trial and yet was not represented by a legal guardian is not to be impeached in execution, but should be reversed or annulled in some direct proceeding taken for that purpose. 44 C. 627 ; 45 B. 503 ; 42 A. 544. The representatives of a lunatic cannot after his death raise an objection in executing court that the decree was null and void and could not be executed, even though the court was asked to appoint a guardian of the lunatic for the purposes of the suit and the court refused to do so and passed a decree against the lunatic. (1917) Pat. 166=45 I.C. 218. A decree against a minor not properly represented is a nullity. 113 P.R. 1918. When a minor is entirely unrepresented before the court which issued the decree against him, that decree is a nullity so far as the minor is concerned. But when a minor is a party to the case and the decree is issued against him, there is no reason to hold that the decree so long as it stands, is invalid. It is only voidable at the instance of the minor. 3 L. 88. In the execution of a decree passed against a minor, the court cannot enquire whether the minor was or was not properly represented in the suit in which the decree was passed. It is bound to presume that the decree was rightly passed. 6 N.W.P. 98. A court cannot refuse to execute a decree merely on the ground that it was passed against a minor who was not represented in the proceedings in which the decree was passed. 5 L. 54.

MORTGAGE DECREES.—A first mortgagee obtained a mortgage-decree against several persons, one of them being a puisne mortgagee of a portion of the property mortgaged to the plaintiff who did not appear to defend the suit, but subsequently proceeded under S. 108 of the old Code (corresponding to O. 9, r. 13 of the new Code) and eventually obtained a modification of the decree in her favour. To these proceedings she alone and none of the other defendants was a party. An application for execution by the first mortgagee which after amendment amounted to an application for

execution of the original decree exempting that portion of the property which was dealt with by the second and subsidiary decree was a good application and capable of execution. A.W.N. (1900) 14.

DECREES OF REVENUE COURTS.—An order of the Revenue Court is not capable of execution by a Civil Court under the C.P. Code. 54 P.R. 1859. There is a distinction between a Civil Court and a Revenue Court. But a Revenue Court is a Civil Court in the sense that it decides a civil question between persons seeking their civil rights. 26 M. 518. The Revenue Courts are courts of civil jurisdiction within the meaning of the C.P. Code in that their decrees when transferred in the regular course are to be treated in all respects as if they were passed by a court of civil judicature. 36 C. 252 ; *contra* in 16 A. 496.

EXECUTION OF JUDGMENT ENTERED UP UNDER SECTION 86 OF THE INSOLVENCY ACT.—The procedure to be followed in execution proceedings on a judgment entered up under S. 86 of the Indian Insolvency Act is that prescribed by the C.P. Code. But such a judgment remains suspended until the Insolvency Court gives its sanction for execution. 8 B. 511.

EXECUTION OF ORDERS.—S. 36, C.P. CODE.—The provision of this Code relating to the execution of decrees shall so far as they are applicable be deemed to apply to the execution of orders.

An order passed on an application preliminary to the institution of the suit itself, such as an application for leave to sue *in forma pauperis* and proceedings passed in execution in regard to such orders as well as orders granting day costs can be executed under section 36, C.P. Code. 17 M.L.T. 447 = 29 I.C. 393 ; see also 38 A. 393 ; 21 A. 133 ; 34 O. 584 ; 12 M. 120 ; 17 B. 514. An order under S. 34 (c) of the Guardians and Wards Act to pay a certain sum of money to another is not an order within the meaning of S. 36, C.P. Code, and is therefore not executable as a decree. 41 M. 241 ; see also 36 M. 39. An order of the Court directing the parties to make payment to the commissioner appointed in the case falls within the purview of section 36 and may be executed as a decree. 40 O.L.J. 180 = 84 I.C. 724. A separate application for execution of costs awarded by an order in the course of execution proceedings is entertainable. 5 I.C. 480. An order under S. 86 of the Indian Insolvency Act is executable. 8 B. 511. An order directing the payment of money to the commissioner as remuneration for the work done in connection with a partition suit is executable. 40 O.L.J. 180 = 52 C. 269. An order for depositing additional costs of a commissioner is not executable as a decree. 10 C.W.N. 234. An order directing the judgment-debtor to give as security a mortgage on immovable property is executable. 2 R. 673. An order made under S. 43 of the Co-operative Societies Act, 1912, has the effect and force of a decree and can be executed and therefore transferred for execution to another court under the provisions of the C.P. Code. 24 Bom. L.R. 909 = (1922) M.W.N. 377. When execution is barred by any law, the decree cannot be executed. See *Res judicata, Execution of Joint Decrees and Transferees*.

CHAPTER II.

COURTS EXECUTING DECREES AND TRANSFER OF
DECREES FOR EXECUTION.

I.—COURTS BY WHICH DECREES MAY BE EXECUTED.

S. 38, C.P. CODE.—A decree may be executed either by the Court which passed it or by the Court to which it is sent for execution.

S. 37. DEFINITION OF COURT WHICH PASSED A DECREE.—The expression “Court which passed a decree” or words to that effect shall, in relation to the execution of decrees, unless there is anything repugnant in the subject or context, be deemed to include,

- (a) where the decree to be executed has been passed in the exercise of appellate jurisdiction, the Court of first instance, and
- (b) where the Court of first instance has ceased to exist, or to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit.

APPLICABILITY.—S. 38 is not limited in its application to Courts established under Local Acts, 34 C. 576.

DECREES BY COURTS OF FIRST INSTANCE.—When the decree to be executed is of a Court of first instance the same Court may execute it. Where the decree is reviewed or amended by such Court, even then it is the same Court that can execute it, as it is the Court that passed the decree under S. 37, C.P. Code. Where a mortgage decree related to property situated within and without the ordinary local jurisdiction of the Court, but the Court had jurisdiction to pass the decree, then it is competent to execute its decree to its fullest extent, even to sell the property outside its local jurisdiction. 21 C. 639. An order passed by a High Court rejecting an application with costs for leave to appeal to the Privy Council is capable of execution by the High Court and not the Court of first instance which originally passed the decree from which the appeal is to be preferred. In this case the Court of first instance for such an order is the High Court. 6 C. 201.

DECREE BY A COURT OF FIRST APPEAL.—When the decree to be executed is a decree passed by a Court of first appeal, then the appellate Court or the Court of first instance whose decree was appealed against may execute it. The word “includes” in S. 37 of the Code gives this construction to the sentence. It does not limit the definition of the expression “the Court which passed the decree”, but declares that

besides the other Court which actually passed the decree it includes the Court which originally passed the decree. It does not exclude such Court. 6 O. 513 ; 28 O. 238 ; 35 O. 974.

DECREE BY HIGH COURT IN SECOND APPEAL.—When the decree to be executed is one passed by a High Court in second appeal, the High Court or the Court of first instance may execute it. But the Court of first appeal is not such a Court. In this respect S. 37 differs from the corresponding S. 649 of the Code of 1882. "The Court of first instance" in cl. (a) is substituted for the expression "the Court which passed the decree against which the appeal is preferred." In practice however the Court of intermediate appeal never executed decrees passed by the High Court. The fact that the High Court on its appellate side does not generally execute its decrees, does not affect its jurisdiction to execute them. It cannot be classed among Courts that have ceased to have jurisdiction to execute a decree. 6 O. 201.

DECREES BY HIGH COURTS IN REVISION.—Where the decree to be executed is one passed by the High Court in revisional jurisdiction, the High Court or the Court of first instance may execute it. The procedure that applies to High Court decrees in appellate jurisdiction must also be applied to High Court decrees and orders in revisional jurisdiction. See section 141, O.P. Code. Applications to execute the latter must therefore be made to the Court which passed the decree originally against which the revision application was preferred and that Court must proceed to execute the decree or order passed on revision according to the rules which are prescribed for execution of its own decrees. 16 B. 550. When the High Court makes an order in the exercise of revisional jurisdiction, it may amount to an order in appeal (when it is made after the revision is admitted) according to the local Act of a Province. The Punjab Courts Act has made such a provision. Therefore an order of the High Court in revision will fall under clauses of the sections referred to above.

WHEN THE COURT OF FIRST INSTANCE HAS CEASED TO HAVE JURISDICTION TO EXECUTE THE DECREE.—In such a case the Court which, if the suit, wherein the decree was passed, was instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit, has jurisdiction to execute the decree.

See S. 37 (b). 49 I.C. 958 ; 6 O. 513 ; 28 O. 238 ; 25 O. 315 ; 31 M.L.J. 90 ; 87 I.C. 341=1924 Mad. 693.

The interpretation mentioned above put on the word "includes" has been applied in this case as well. The Court which passed the original decree is a proper Court for execution, even though the property, over which it had jurisdiction at the time of the decree, was taken away from it and assigned to another Court at the time of presentation of the application for execution on the ground that S. 37, O.P. Code, does not operate to exclude the Court which actually passed the decree and substitute for it another Court. And it is still open to the decree-holder to apply to the former for execution by way of transmission of the decree to the Court which has territorial jurisdiction. 42 M. 821 F.B. A mortgage decree passed by Court A can be executed by Court A or Court B, if after the passing of the decree but before execution the area in which the property is situate is transferred by Government orders to the jurisdiction of Court B. The section is permissive. 28 O. 238 ; 6 O. 513 ; 35 O. 974 ; 11 L.W. 63 ; 15 O. 667 ; 17 M.L.J. 417 ; 25 O. 315 ; 5 O.W.N. 150. 37 M. 462 is overruled by 42 M.

621 F.B. A Court does not cease to have jurisdiction to execute its decree merely because its business is transferred by the District Judge under the Act constituting it to another Court. 25 O. 315; 27 O. 272. A Court does not cease to have jurisdiction if after passing of the decree, a party is added in execution who, had he been a party when the suit wherein the decree was passed was instituted, would have deprived the Court of its jurisdiction. 38 B. 662. An order passed by a High Court rejecting an application with costs for leave to appeal to the Privy Council is capable of execution by the High Court, and the High Court cannot be deemed to have ceased to have jurisdiction to execute it. The Court of first instance has no power to execute such an order unless directed by the High Court. 6 C. 201. Where a Court for special persons passes a decree and before execution the defendant dies and his heirs do not come within the class of persons for whom the Court exists, the Court ceases to have jurisdiction. 17 B. 162; 11 B. 153. Where the Small Cause Court powers of a Munsiff invested with such powers were withdrawn by notification after the decree in a suit but prior to execution, the Court of the Munsiff is said to have ceased to have jurisdiction. An application for execution must be made to the Court in which the Small Cause Court's jurisdiction vests at the time of the application for execution. 19 M. 445; 3 M. 462; 31 M.L.J. 22=35 I.C. 296; 31 M.L.J. 90=35 I.C. 237; 26 I.C. 413; (overruled by 42 M. 821 F.B.) Where a Court in which a suit had been instituted had jurisdiction, but ceased to have it when the time came for applying for the execution, its jurisdiction having been distributed between two or three other Courts, any one of such Courts could entertain the application for execution. 27 I.C. 88; 49 I.C. 94. The Court that passed a decree for sale of immoveable property having no territorial jurisdiction at the time over the property cannot order the sale of the property in execution. 33 M.L.J. 750=43 I.C. 79; 43 M. 135. The pecuniary jurisdiction of a Munsiff was raised by an order of the Local Government on a certain date, but the date of issue of notice to that effect was long after. Between these two dates an application was made to the Munsiff which but for the order of the Government should have been made to the sub-judge, *held*, that notwithstanding the delay in issuing the notification, the Munsiff acquired the superior jurisdiction and was competent to dispose of the application. 30 I.C. 205=2 O.L.J. 212. A Court may execute its own decree against immoveable property outside its own jurisdiction when it had jurisdiction to try the suit. 163 P.L.R. 1901. The Court does not cease to have jurisdiction when the headquarters are moved to another place. 6 O. 513. When after the passing of the decree and before execution, the jurisdiction over the subject-matter of the decree has passed to another Court, the Court passing the decree must send it for execution to the Court which has territorial jurisdiction over the matter of the decree. 46 M.L.J. 250=79 I.C. 806. When subsequent to the passing of a money decree the area in which the judgment-debtor lived was transferred to another Court, it is open to the latter Court to execute the decree. 73 I.C. 956=45 M.L.J. 210. When an order under S. 13 (2) of the Assam Civil Courts Act (XII of 1887) re-arranging the work of the subordinate Judges was passed by the District Judge, the jurisdiction of the former did not cease to exist to execute the decrees passed by them. 6 Pat. L.J. 304. A mortgage-decree was passed by the Additional District Munsiff at A in respect of properties within the territorial jurisdiction of the Court B. The Court at A had no jurisdiction at all but was established simply to aid the other Courts of the District. The Court at B was held to have no jurisdiction to execute the decree so long as the Court at A had not ceased to exist and the Court at B could only execute it when the decree was transferred to it for execution. 43 M. 461. In a mortgage suit, the preliminary decree was passed by a Munsiff having jurisdiction to try suits up to the value of Rs. 2,000. The Munsiff being transferred and his successor not having been invested with the same powers, the final decree was made by the subordinate judge. Execution was, however, taken in the Court of the Munsiff who meanwhile had been empowered, to try suits up to Rs. 2,000. *Held*, that the Munsiff's Court had

jurisdiction to execute the decree, under S. 150, though not under Ss. 37 and 38 of the Code. 24 C.W.N. 899=57 I.C. 879. A decree of the Chief Court of Lower Burma was transferred for execution to the District Court of Ramnad and was by that Court transferred for execution to the subordinate Court of Ramnad. In execution of that decree, the latter Court sold property of the judgment-debtor which at the time of the said sale was admittedly situated in the territorial jurisdiction of another Court (i.e., Sub-Court of Sivaganga). On the objection of the judgment-debtor as to the jurisdiction of the subordinate Court, it was held that although the transfer of the decree to the subordinate Court of Ramnad was valid on the ground that the property was on the date of such transfer situated in its territorial jurisdiction, yet the sale by that Court was invalid because on the date thereof it ceased to have territorial jurisdiction over the property. 33 M.L.J. 750=43 I.C. 79. When after the passing of a decree charging certain property with the payment of a sum of money the property charged is transferred from the jurisdiction of the Court which passed the decree to the jurisdiction of another Court, the latter Court must be deemed to be the Court which passed the decree. At the same time the former Court does not cease to have jurisdiction to execute, and an application presented to such a Court is not one presented to an improper Court under Art. 182 (5) of the Limitation Act. 27 Bom.L.R. 649. Where a Court which passed a decree had jurisdiction under S. 13 (1) of the Bengal, N.W.P. and Assam Civil Courts Act, over a certain area, an application for execution of a decree by attachment and sale of immoveable property situated within that area lies in such Court. The mere fact that the jurisdiction of the Court has been limited under S. 13 (2) of the Act to civil business arising out of an area which does not contain such immoveable property, does not deprive the Court of its jurisdiction to execute a decree passed by it by attachment and sale of immoveable property situate within the area over which it has been given jurisdiction by the Local Government. 86 I.C. 775.

WHEN THE COURT OF FIRST INSTANCE HAS CEASED TO EXIST.— The court which if the suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree would have jurisdiction to try such suit (S. 37 (b)).

17 W.R. 472 ; 9 B.H.C. 113 ; 7 W.R. 124.

A Court does not cease to exist if its headquarters are removed to another place or if the local limits of the jurisdiction of the Court are altered. 6 C. 515. When after the passing of a decree the Court of the additional Sub-Judge is abolished and its business is transferred to another Court, and subsequently the Court of the additional Sub-Judge is re-established, such a Court is held not to have ceased to exist for the purposes of executing decrees passed by the former Court. 4 Pat. 689.

DECREEES AND ORDERS OF PRIVY COUNCIL.— When the decree was passed by the Privy Council in appeal the Court of first instance had the power to execute it after recognising transfer without directions from the High Court in that behalf. 38 M. 382 ; 23 I.C. 235. For executing a judgment or order of His Majesty in Council application ought to be made to the court from which the appeal was finally brought and such court ought to give directions to the court by which the suit was originally tried. A declaration of His Majesty in Council is a direction to the court below to clothe it in the form of a mandatory order and to give effect to such order. 18 W.R. 175. If the application for execution of an order of His Majesty in Council is made elsewhere than in the High Court, the proceedings are bad. 21 W.R. 102. In receiving and filing for the purposes of execution an order of His Majesty in Council made on appeal from an

order of the court of original instance such court does not exercise a discretionary power but performs a function of a purely ministerial character. 22 O. 960. An order of a High Court Judge refusing the transmission of a Privy Council decree for execution is a judgment under S. 15 of the Letters Patent and is appealable to the High Court. 9 O. 482 P.C. A Court of first instance is bound to execute a Privy Council decree forwarded by the High Court as if it was an express decree of the High Court. 20 W.R. 419. When a decree was affirmed by an order of the Privy Council the order must be executed with the execution of the decree and not as a separate decree. 19 W.R. 301.

DECREES UNDER RENT ACT.—A decree passed by a Civil court can be transferred for execution to a Rent court and *vice versa*. 13 O.C. 119. The High Court is competent in the exercise of its powers of supervision to decide the question of transferring a decree for rent made in one district to a different district for execution. 9 C. 295 P.C.

VILLAGE MUNSIFF'S COURT UNDER REGULATION IV OF 1816.—Regulation IV of 1816 enables a Village Munsiff's Court to execute its decree only against personal property and not against immoveable property. 9 M. 378 F.B. S. 29 of the Regulation IV of 1816 does not empower the Civil courts to make an order for the execution of a decree in a civil suit, tried before a Village Munsiff. That section applies only when a Munsiff under that Act has been guilty of corruption or partiality in the decree of a case. 4 M.H.C. 188.

COURTS OF SMALL CAUSES.—Sales of immoveable property in execution of a decree may be ordered by any Court other than a Court of Small Causes. (O. 21, r. 82).

A decree relating to immoveable property is not immoveable property and can be attached and sold by the Small Cause Courts. 16 N.L.R. 72=44 I. C. 252. A decree of a Small Cause Court can be transferred for execution to a Civil Court of ordinary jurisdiction. 18 B. 61; 1 B. 82. Where a decree is transferred to the latter Court it may execute it against the immoveable property of the judgment-debtor. 1 B. 82. The Judge of a Small Cause Court when duly invested with powers of a Subordinate Judge, has in the exercise of such powers general jurisdiction. He has, therefore, power to order execution against the immoveable property within his jurisdiction in execution of a decree passed by him on the Small Cause Side. 1 A. 624.

REGISTRAR OF THE COURT.—A Judge of a Presidency Small Cause Court has jurisdiction to execute the decrees of a foreign Court, but the Registrar of the Court has no power under S. 13 or 35 of the Presidency Small Cause Courts Act to issue process in execution of a foreign decree. 40 I. C. 670=(1917) M.W.N. 498.

THE COURT TO WHICH DECREE IS TRANSFERRED FOR EXECUTION MAY EXECUTE IT—According to section 38, C.P. Code, a decree may be executed only either by the Court which passed it or by the Court to which it is sent for execution. The section is exhaustive.

10 M.L.T. 79=12 I.C. 78.

The conditions required for transfer of a decree for execution to another Court are,—

(i) the Court which passed a decree may on the application of the decree-holder send for execution to another Court having territorial and preliminary jurisdiction, or

(ii) the Court which passed a decree may of its own motion send it for execution to any subordinate Court of competent jurisdiction. See Section 39, C.P. Code.

(i) TERRITORIAL JURISDICTION.—A Court has territorial jurisdiction to execute a decree, (a) if the person against whom the decree is passed actually and voluntarily resides or carries on business or personally works for gain within the local limits of the jurisdiction of such Court, or (b) if such person has property within the local limits of the jurisdiction of such Court and the execution is to be enforced against such property. A Court has no jurisdiction in execution of a decree to attach or sell property over which it had no jurisdiction (territorial) at the time it passed the order. 18 L.W. 747; 10 W.R. 137; 5 Bom. L.R. 570; 42 M. 821; 17 C. 496; 79 I.C. 806=46 M.L.J. 250=80 I.C. 901. Territorial jurisdiction is a condition precedent to a Court executing the decree. 17 C. 699, 703; 79 I.C. 806=46 M.L.J. 250; 14 O.L.J. 228.

Sub-judges having jurisdiction in the whole district.—It is quite incompetent for a District judge to assign to subordinate judges, appointed by the Local Government with jurisdiction over whole of the district, different areas so as to limit or define their respective jurisdiction. 27 C. 272. Where no order has been made by a District judge under S. 13 of the Civil Courts Act assigning to each of two or more subordinate judges having the same local jurisdiction, the particular business to be done by each, the Subordinate judges must be taken to have concurrent jurisdiction 4 I.C. 510=13 C.W.N. 265.

Where a decree has been transferred for execution to the collector the subject-matter of delivery to the purchaser of the property sold in execution is still within the jurisdiction of the Court which passed the decree. 7 A. 407. It is not competent to a Court in execution of a decree to attach property outside its jurisdiction or to attach a debt payable to the judgment-debtor outside the jurisdiction by a person not resident within the jurisdiction of that Court. 22 C.W.N. 160=36 I.C. 457; 2 B. 532; 6 B. 243 F.B.; 18 W.R. 123. It is illegal for a Court to attach money lying in a Court in another district. The proper procedure is to notify under O. 21, r. 52 and to have the decree transferred to the latter Court. 26 I.C. 941=7 Bur. L.T. 277. An attachment and sale of property situate outside the limits of the Court that passed the decree is improper and without jurisdiction. 7 C. 410. A Sub-judge has inherent jurisdiction to execute the decree passed by a District Munsiff within the same District. 15 M. 345.

PECUNIARY JURISDICTION.—A Court has pecuniary jurisdiction to execute a decree if the amount of the decree does not exceed the pecuniary limits of the jurisdiction of such Court. The Calcutta, Bombay and the Punjab High Courts have held that a Court to which a decree is sent for execution has no jurisdiction to execute the decree if the amount or value of the subject-matter of the suit in which the decree was passed exceeds the pecuniary limits of its ordinary jurisdiction. According to these Courts proceedings in execution are merely a continuation of the suit. Therefore a Court which has no jurisdiction to try the suit can have no jurisdiction to execute

the decree passed in that suit, 7 C. 465 ; 17 C. 457 ; 37 C. 574 ; 12 B. 155 ; 16 C. 457 ; 57 I.C. 722 ; 12 B. 155 ; 70 P.R. 1897 ; 9 P.R. 1901 F.B. (overruling 31 P.R. 1887). The Madras High Court holds a contrary view and its decisions are based on the ground that the section of the Code providing for the transfer of decrees (S. 39) gives an extraordinary jurisdiction to the Court to execute the decree in a suit beyond its pecuniary limits sent to it for execution. 3 M. 397 ; 17 M. 309 ; 15 M.L.T. 148—22 I.C. 275 ; 2 O.C. 315. When a decree is passed by a judge who is invested with jurisdiction to try suits up to Rs. 2,000, and an application for execution is made to his successor who is not invested with jurisdiction to try the case being over Rs. 1,000, such an application is made to the proper Court. 2 Pat. L.J. 113—(1917) Pat. 116—39 I.C. 63.

HEARING OF OBJECTION UNDER O. 21, R. 58, WITH RESPECT TO A CLAIM WHOSE VALUE IS ABOVE THE JURISDICTION OF THE COURT.—

When a Court has jurisdiction of Rs. 1,000, and an objection is made to the attachment on the ground that the objector has a mortgage lien of above Rs. 5,000, in value on the attached property and the claimant prays that the property be sold subject to the mortgage, it is held that the executing Court has jurisdiction to entertain the application of the claimant as the subject-matter of it is the attachment placed upon the property of the judgment-debtor and not the mortgage lien and that the subject-matter must be valued according to the judgment debt sought to be recovered by the attachment, 6 B. 582, 584.

(II) TRANSFER TO A SUBORDINATE COURT OF COMPETENT JURISDICTION.—The court to which a decree is sent under S. 39 (b) must be a Court of competent jurisdiction, 4 Bur. L.T. 224—12 I.C. 27. A Munsiff exercising powers of a Small Cause Court cannot *suo motu* transfer an execution case to himself as Munsiff exercising jurisdiction on the regular side. An application by the decree-holder is required, 3 P.L.R. 1905 ; 8 B. 230 ; 9 B. 237 ; 18 B. 61.

II.—WHEN A COURT MAY SEND ITS DECREES FOR EXECUTION TO ANOTHER COURT.

S. 39, C. P. CODE.—(1) The Court which passed a decree may on the application of the decree-holder send it for execution to another Court :—

- (a) if the person against whom the decree is passed actually and voluntarily resides or carries on business or personally works for gain within the local limits of the jurisdiction of such other court, or
- (b) if such person has not property within the local limits of the jurisdiction of the court which passed the decree sufficient to satisfy such decree and has property within the local limits of the jurisdiction of such other court ; or

- (c) if the decree directs the delivery or sale of immoveable property situate outside the local limits of the jurisdiction of the court which passed it, or
- (d) if the court which passed the decree considers for any other reason which it shall record in writing that the decree should be executed by such other court.

(2) The court which passed a decree may of its own motion send it for execution to any subordinate court of competent jurisdiction.

APPLICATION BY THE DECREE-HOLDER.—Under clauses (a), (b) and (c) there must be an application by the decree-holder or his transferee for transfer of the decree for execution, naming the court to which he wants the decree to be sent for execution; while under cl. (2) the court may send it of its own motion, or on the application of the decree-holder. 26 M. 258. A Munsiff invested with small cause jurisdiction cannot of his motion and without any application by the decree-holder transfer to the ordinary side of his Court the execution of a small cause decree. 3 P.L.R. 1905; 8 B. 230; 9 B. 237; 18 B. 61.

DISCRETIONARY POWER OF THE COURT.—It is discretionary with the court to send its decree for execution to another court. It is not obligatory. 19 O. 13; 3 P.L.R. 1901. The application of this principle comes in with respect to land situate in the jurisdiction of more courts than one. The court which passed the decree may either execute such decree by itself or transfer it for execution to another court. Section 39 extends the jurisdiction of the court and does not curtail it so far as execution of the decree is concerned. 15 C. 667; 14 C. 661; 12 C. 307; 2 O.L.R. 394; 12 O.L.R. 404.

Cl. (b).—See 48 I.C. 943=4 Pat.L.J. 141; 79 I.C. 806=46 M.L.J. 250; 80 I.C. 901=6 Pat. L. T. 71; There is no provision that where a decree is transmitted for execution to another Court it intended the decree to be executed even against the properties situated within the jurisdiction of the transmitting Court. 18 L. W. 747. The Court to which a decree is sent for execution cannot sell the property situate outside its jurisdiction even though the order of transfer is made by a District Court having jurisdiction over the property. 43 I. C. 79=33 M. L. J. 750; 43 M. 135.

Cl. (c).—See notes *infra*. This clause does not curtail the powers of the Court to execute its own decree but gives it a discretion either to execute the decree itself, or on the application of the decree-holder to send it to another Court for execution. 15 O. 667.

Cl. (d).—The Court of Small Causes, passing a decree, has power, for any good reason to be recorded in writing, to transfer its decree to the other branch of the same Court as it might to a different Court. 8 B. 230; 9 B. 237 1 A. 624 8 M. 8. See also 18 B. 61. Every Court is bound to execute its own decree. It is only when the decree cannot be executed within its jurisdiction that it should be sent to another Court, where execution can be had. 19 W. R. 346. The Court may, when it would be convenient to

act, transfer it for execution to another Court. 12 C. 907 ; 2 C. L. R. 334 ; 12 C. L. R. 404 6 W. R. 346 ; 85 I. C. 411. There should be a transfer of the whole decree. A transfer of one-third of the decree is irregular and cannot be held to be binding on the judgment-debtor who had no notice of the application and the Court to which such part is sent is right in treating the transfer as if it was a transfer of the whole decree. 3 Pat. L. W. 247=43 I. C. 186.

TRANSFER FOR A LIMITED PURPOSE.—A decree cannot be transferred to another Court for execution for a limited purpose only, *e.g.*, to enable the decree-holder to share in the rateable distribution of assets held by another Court. 1 Pat. L. W. 247=43 I. C. 737.

FACT OF THE COURT BEING MISLED IN TRANSFERRING.—The mere fact that the Court which made the order of transfer to another Court was misled into making such an order, does not vitiate the validity of the order. 8 M.L.J. 1. A Court that can execute a decree has power to transfer it under S. 39. 23 Bom. L. R. 1909. The power of the Court is not restricted by this section in granting a certificate of transfer of the decree for execution to cases where the decree cannot be executed within the jurisdiction of the Court. 19 W. R. 307.

SIMULTANEOUS OR CONCURRENT EXECUTION AT MORE PLACES THAN ONE.—A court which passed a decree may send it to more courts than one for concurrent execution, or may keep the power of executing it by itself expressly simultaneously. 18 B. 61 ; 15 A.L.J. 532=39 I.C. 729 ; 8 C. 697 ; 13 O.P.L.R. 169 ; 14 M.I.A. 529. But this power should be sparingly used and generally the conditions should be imposed on the decree-holder that he should not get all the properties under attachment sold at once. 15 I.C. 738=23 M.L.J. 236 ; on appeal 31 M.L.J. 300 P.C. ; 17 W.R. 289 ; 3 L.W. 336. There is nothing in law to prevent a decree being simultaneously executed in more places than one against the properties of the judgment-debtor. 34 I. C. 302 ; 1 C.L.J. 315. Two executions of the same decree, so far as attachment of different properties of the judgment-debtor is concerned may proceed simultaneously, though ordinarily the sales in execution should not take place simultaneously. 7 C.L.R. 537. O. 21, r. 11 is no bar to the maintenance of concurrent execution. 4 Pat. L.T. 99=71 I.C. 741. The legality of the concurrent execution is recognised, both in the old as well as in the new codes though in practice it is not generally carried out. On principle there is no difference between a concurrent execution after transfer in another court and a concurrent execution in the court in which the decree was passed. That concurrent execution is not disfavoured is indicated by S. 46, C.P. Code. Separate and successive applications for execution giving reliefs of different characters may always be made. 71 I.C. 741=4 Pat. L.T. 99 ; see also 8 C. 697 ; 1 O.L.J. 315 ; 37 M. 232 ; 16 C. 515 ; 18 A. 98.

EX PARTE ORDER OF TRANSFER.—A party against whom an *ex parte* order of transfer has been made has a right to apply to the judge to set it aside. 13 W.R. 232, and the court may hear both the parties (*ibid*).

III.—TRANSFER OF DECREE TO FOREIGN COURTS.

S. 45, C.P. CODE.—So much of the foregoing provisions of this part as empowers a court to send a decree for execution to another court shall be construed as empowering a court in British India to send a decree to any court established or continued by the authority of the Governor General in Council in the territories of any foreign prince or State

to which the Governor General in Council has by notification in the Gazette of India, declared this section to apply.

A British Indian Court which passes a decree cannot transmit the same for execution to a court in a Native State unless provided for in S. 45 of the Code. 32 M.L.J. 488—41 I.C. 41; 12 B. 230; 29 C. 400; 42 B. 420. For notifications under this section, see List E. The court of the Political Agent of Sikkim is a court established or continued by the authority of the Governor General in Council. 38 C. 859.

IV.—TRANSFER OF DECREES FROM FOREIGN COURTS.

The law for the execution of such decrees is dealt with in Ss. 43 and 44 dealt with in Chapter I. The procedure for transferring such decrees is prescribed by the Foreign courts. 34 C. 576. A judge of a Presidency Small Cause Court has power to order execution of a decree transferred to it for execution from the court of a Native State in alliance with the British Government. (1917) M.W.N. 498.

V.—TRANSFER OF DECREE TO ANOTHER PROVINCE.

Where a decree is transferred for execution in another province, it shall be sent to such court and executed in such manner as may be prescribed by rules in force in that province. (S. 40, C.P. Code.)

But as to whether execution is barred by limitation or not it is the law governing the court which passed the decrees that applies. 17 C. 491.

VI.—A COURT EXECUTING A DECREE BEYOND ITS JURISDICTION.

Territorial and pecuniary jurisdiction as stated above is a condition precedent to a court executing a decree. The following are exceptions to this general rule and in these cases the court can execute a decree even though beyond the limits of its jurisdiction. 1926 S. 51=89 I.C. 401.

1. Where immovable property forms one estate or tenure situate within the local limits of the jurisdiction of two or more courts, any one of such courts may attach and sell the entire estate or tenure. (O. 21, r. 3).

43 P.R. 1918; 12 C. 307; 23 W.R. 154; 19 W.R. 434; 8 C. 703; 12 C.L.R. 404.

When the subject-matter of a suit is within the jurisdiction of a court, the jurisdiction of such court would continue on all such matters in the suit as are brought within its cognizance. 10 B. 200; 8 B. 31; 19 C. 13; 21 C. 639; 22 C. 871; 13 C. 13; 8 P.R. 1902.

(2) The court which passed a decree for the enforcement of a mortgage of immovable properties, some of which are situate within and some beyond the jurisdiction of the Court, has power, in execution of its decrees, to order the sale of those properties also that are situate beyond the jurisdiction. 21 C. 639; 19 C. 13; 15 C. 667; 14 C. 661; 43 P.R. 1918; 22 C. 831; 1926 M. 421=50 M.L.J. 161. The fact that all

the property is not situated within the jurisdiction of the court which passed the decree, does not affect its jurisdiction to sell the property comprised in the decree. 29 I.O. 745 ; 21 O. 639.

(3) Where in such a decree as is mentioned in (2) above the whole of the property comprised in the decree is declared by transfer of jurisdiction to fall beyond the local limits of such court the application for execution may be made to the above mentioned court and such court in order to effect the sale of the property may transfer the decree for execution to another court within whose jurisdiction the property is situate. 28 O. 238 ; 6 O. 513 (also See *supra*).

(4) Where the property to be attached is the salary or allowance of a public officer or a servant of a railway company or local authority the court, whether the judgment-debtor or the disbursing officer is or is not within the local limits of the court's jurisdiction, may order that the amount shall, subject to the provisions of S. 60 C.P.C., be withheld from such salary or allowance, either in one payment or by monthly instalments as the court may direct. See O. 21, r. 48, C.P. Code, and notes thereunder. Under the old Code of 1882 the salary could not be attached outside the jurisdiction of the court. 6 A. 243 F.B. ; 12 B. 44 ; 40 P.R. 1885.

(5) When a Court is competent to pass a decree it will not be deemed to be incompetent to execute it even if the pecuniary limits of its jurisdiction are exceeded by adding interest, rent or other mesne profits which accrue after the institution of the suit. 10 B. 200 ; 21 O. 550 ; 40 O. 56.

6. PRECEPT.—(1) Upon the application of the decree-holder, the Court which passed the decree, may, whenever it thinks fit, issue a precept, to any other court which would be competent to execute such decree, to attach any property belonging to the judgment-debtor and specified in the precept.

(2) The court to which a precept is sent shall proceed to attach the property in the manner prescribed in regard to the attachment of property in execution of a decree:

Provided that no attachment under a precept shall continue for more than two months unless the period of attachment is extended by an order of the court which passed the decree, or unless before the determination of such attachment, the decree has been transferred to the court by which the attachment has been made and the decree-holder has applied for an order for the sale of such property.

OBJECT.—The object of the precept is to help the decree-holder against the evasion of decrees by the judgment-debtor by obtaining an interim attachment when there is apprehension that he may be deprived of the fruits of his decree.

THE CONDITIONS REQUIRED FOR A PRECEPT ARE.—(1) There must be an application by the decree-holder for issuing the precept. (2) The property sought to be attached lies within the jurisdiction of the other court to which the precept

is to be issued. (3) It is discretionary with the court to issue a precept. When there is apprehension that the judgment-debtor would conceal all his property before the decree can be transferred to another court, it is a fit case for precept. (4) The Court to which the precept is to be sent must be competent to execute the decree. (5) The property to be attached must be specified in the precept. (6) The attachment under precept shall not remain for more than two months unless, (a) the period is extended by an order of the court which passed the decree, or (b) before the determination of such attachment the decree has been transferred to the court by which right attachment has been made and the decree-holder has applied for an order for the sale of such property. An attachment under precept is not invalidated by the fact that the order extending the statutory period of two months during which the attachment will remain in force, is passed after the expiry of the said period provided that the application for extension of time is put in before the expiry of the said two months. In such a case the order relates back to the date of the petition and has a retrospective effect. 34 I.C. 302 = 3 L.W. 336.

VII.—POWERS OF THE COURT THAT PASSED THE DECREE, IN EXECUTION.

THE COURT EXECUTING A DECREE CANNOT GO BEHIND THE DECREE.—

A court executing a decree is bound to execute it as it stands. It cannot, question the terms of the decree, and has no right in any way to add to or amend the terms thereof. Any amendment thereof can be made either by review or under Sec. 151 and 152 C.P. Code. 28 O. 353 ; 40 A. 659 ; 58 I.C. 276 = 1 Pat. L.T. 471 ; 55 I.O. 816 ; 44 I.O. 530 ; 40 M. 233 ; 5 O. 53 ; 10 M. 283 ; 11 B. 537 ; 24 M. 665 ; 25 M. 537 ; 39 P.W.R. 1918 ; 41 A. 517 ; 18 I.C. 48 ; 38 I.C. 691 ; 32 M.L.J. 553 ; (1917) Pat. 212 ; 45 I.O. 218 ; 35 C.L.J. 339 ; 69 I.O. 565 = 1923 M. 212 ; 14 M.L.T. 96 ; 4 A. 376 ; 20 A. 393 ; 24 I.O. 206 ; (1914) M.W.N. 152 ; 37 A. 278 ; 34 I.C. 362 ; 8 W.R. 277 ; 17 A.L.J. 510 ; 15 I.O. 719 ; 16 I.O. 735 ; 34 I.C. 787 = 3 L.W. 499 ; 33 I.O. 344 ; 19 B. 106 ; 15 B. 644 ; 1 N.W.P. 198 ; A.W.N. (1898) 17 ; 10 B. 65. It cannot entertain objections as to the correctness or legality or validity of the decree. 34 A. 321 ; 42 I.C. 282 ; 11 I.C. 192 = 5 S.L.R. 71 ; 37 A. 278 ; 46 I.C. 52 = 5 O.L.J. 179 ; 60 P.L.R. 1919 ; 10 I.O. 536 = 14 O.L.J. 648 ; 45 B. 503 ; 42 A. 544 ; 39 M. 570 ; (1919) Pat. 121 = 48 I.C. 245 ; 46 I.C. 52 ; 8 I.O. 26, 610 ; 48 I.C. 245 ; 32 I.O. 492 ; 4 Pat. L.T. 311 ; 67 I.C. 753 ; 38 I.C. 691 ; 47 I.O. 143 ; 27 I.C. 444 ; 14 I.O. 29 ; 12 I.C. 689 ; 24 I.C. 195 ; 24 I.C. 195 ; 22 I.C. 293 ; 28 M. 26 ; 20 I.O. 704 ; 7 B. 337 ; 23 A. 181 ; 27 I.C. 444 ; 55 I.C. 256 ; 60 I.C. 206 = 24 C.W.N. 1070 ; 10 I.O. 975 ; 38 I.C. 691 ; 42 I.C. 282 ; 44 C. 627 ; 14 I.C. 29 ; 12 I.O. 689. It cannot refuse execution on the ground that plaintiffs were improperly allowed to institute the suit. 4 M. 324 ; or because it was obtained in contravention of S. 99 T.P. Act. 31 C. 922. The executing court has no power to allow or disallow costs in variation of the terms of the decree. 2 C.L.R. 152 ; or add costs to the Privy Council decree. 3 C. 161 ; 19 W.R. 330 ; 9 W.R. 387 ; 13 W.R. 23. It can add execution costs. 44 A. 350 ; 32 I.O. 754 = 2 O.L.J. 611.

Interest.—When a decree is altogether silent about the interest the Court is not competent in execution to grant any interest. 5 W.R. Mis 28 ; 14 W.R. 62. Where a decree did not provide for interest from date of suit, but the judgment-debtor undertook to pay it on the decree-holder consenting to an adjournment of the sale of the judgment-debtor's property in order to enable the latter to raise the decretal amount by private sale or mortgage, and the Court granted the adjournment, the inference is that the court sanctioned the condition and the condition could be enforced in execution of the decree. 7 M. 400. It cannot award interest from year to year upon mesne profits which ought to have been received when the decree awarded interest from the date of ascertainment of such profits. 8 O. 332. The court has no inherent power to allow or disallow interest under S. 151 C. P. Code. 3 Bur. L.J. 58 = 82 I.O. 427.

Transferability of holding under the decree.—Where a decree specifically directs the sale of a tenure which may or may not be transferable, the court executing the decree is bound to give effect to it and not to question its validity. An objection by the judgment-debtor that the property was not transferable under S. 9 of the N.W.P. Rent Act cannot be entertained in execution of such a decree. 10 A. 130.

When two compromise decrees for rent were passed against the tenant, which provided for sale of the tenure, and under the earlier decree the tenure was sold, and the decree-holder applied to execute the second decree against the person of the defendant, *held* that the Court cannot go behind the decree, but if possible can give effect to both the decrees. The second decree having been passed before the sale, the sale must be deemed to have taken place subject to the second decree and hence the decree-holder must proceed in the first instance against the property itself. 26 C.W.N. 708.

Limitation for passing the final decree.—An objection that the final decree was passed more than 3 years after the passing of the preliminary decree cannot be entertained by the executing Court. 2 Pat. L.T. 118=39 I.C. 76. It cannot extend the period of redemption. 13 B. 106; 15 B. 644; 2 N.W.P. 59. A decree absolute in a mortgage suit made by a Court in the presence of both the parties and on proper adjudication cannot be challenged in execution on the ground that the Court ought not to have gone into and made the decree absolute inasmuch as it was barred by limitation. 47 I. C. 143.

An executing Court will execute the decree as it finds and not as the parties understand it. 29 M.L.J. 219=30 I.C. 357. A decree must be executed as it stands and the executing Court cannot go behind the terms of the decree. The Legislation has enacted special provisions, such as O. 21, r. 2 and O. 20, r. 11, which enable Courts to recognise agreements between parties after the decree has been passed. 40 M. 233 F.B. It cannot grant instalments otherwise than under O. 20, r. 11; 2 N.W.P. 59; 17 C.W.N. 934=18 I. C. 394. It cannot enlarge, extend or modify the decree subsequent to the decree except as provided for in O. 20, r. 11. 1922 Cal. 311; 78 I.C. 853.

Mesne profits.—A Court can ascertain mesne profits if it is left for such a Court. 8 I.C. 295; 41 A. 517. But when mesne profits had already been ascertained and allowed at a certain rate, no deduction can be made and the decree must be executed as it stands. 41 A. 517.

Extension of time.—A Court passing a decree conditional on payment of a certain amount within a fixed time cannot extend the time for payment after the expiry of that period. 13 A. 400. It cannot extend the time for the payment of money allowed in the decree. (1911) M.W.N. 240. The Court executing a decree cannot deal with the question whether the decree should stand or should be set aside. 45 B. 503; 45 B. 946. It cannot set aside a decree because it was passed against a wrong party. 40 C.L.J. 254=84 I.C. 999. When the holder of a mortgage decree against an insolvent was a consenting party to a composition sanctioned by the Insolvency Court, the executing Court dealing with an application for execution of the mortgage decree cannot go behind the order passed in those proceedings. 59 I.C. 95 (C.).

Merits.—An executing Court cannot go behind the decree and enter into its merits or de-merits. It's only functions are to carry out the directions in the decree as they are. 23 Bom. L.R. 1072. The fact that the decree is difficult to execute does not render it incapable of execution. 63 I.C. 975 (L). An executing Court is bound to give effect to the terms of the decree when it is clear and unambiguous though it may regard the decree as erroneous. 3 L.L.J. 263; (1914) M.W.N. 152=22 I.C. 293; 4 M. 824; 21 M.L.J. 1036; 38 B. 194; 36 I.C. 10; Marsh. 244; 10 W.R. 95; 9 W.R. 387; 13 W.R. 330. An executing Court cannot add to or vary the terms of a decree. 27 C. 951; A.W.N. (1907) 286; 28 C. 353; 15 B. 644; 25 B. 707; 36 I.C. 500. It cannot grant instalments if not provided for in the decree. 17 C.W.N. 934=18 I.C. 394. An

executing Court cannot nullify a decree for contribution on any ground. 13 B. 106. It cannot refuse execution on the ground that it was obtained without a succession certificate. 146 P.L.R. 1906.

Relying on collateral judgment.—The executing Court cannot go behind a decree and rely on the collateral judgment even of a superior Court against the decree. 82 I.C. 434. An executing Court has no power to direct the decree-holder to build or to build at any plot other than that provided by the decree. 65 I.C. 126.

Amendment by a Court.—An executing Court can decide whether an amendment of a decree is *ultra vires* or otherwise. (1922) Cal. 136. An executing Court has no power to go behind the decree even though it gives the decree-holder what he may not be entitled to under the *Tenancy Act*. 37 A. 278.

Liability of an exonerated defendant.—When in a suit against two persons for sale on a mortgage, one of them is released from all liability by the decree, it is not open to the executing Court to execute the decree against the person so exonerated, though the decree-holder has succeeded in getting an *ex-parte* amendment of the decree so as to affect even the exonerated defendant. 40 I.C. 47; 44 I.C. 998.

THE COURT EXECUTING A DECREE CANNOT QUESTION THE JURISDICTION OF THE COURT THAT PASSED THE DECREE.—Under O. 21, r. 7, C. P. Code, the executing Court has no power to question the jurisdiction of the Court which passed the decree under execution. Under the old Code the Court had such power. 22 P.R. 1919; 38 B. 194; 43 M. 675 F.B.; 10 I.C. 536=14 C.L.J. 648; 20 I.C. 704; 19 I.C. 630; 36 I.C. 10. An executing Court cannot go behind a decree and enquire whether the Court was entitled to pass that decree in view of what was actually alleged by the plaintiff in the plaint. 5 Pat. L.T. 368=78 I.C. 303.

CONSTRUCTION OF DECREES.—It is open to a Court executing a decree to construe it in the light of the plaint and the judgment if there is any ambiguity in the decree. 31 I.C. 478; (1919) M.W.N. 914; 39 I.C. 561; 16 I.C. 173, 183; 19 I.C. 159; 13 A. 344; 18 B. 542. Though as a general rule the decree must be construed by its own terms and nothing should be imported therein which is not clearly and properly expressed in the decretal order, still if the decree is most carelessly drawn and the words therein standing by themselves are unmeaning, a reference to the judgment may be made and a meaning which such reference showed that they were intended to bear may be given. 45 P.R. 1882. The Court can only construe the decree without adding to or subtracting from it. 9 C.L.J. 288. When there is a variance between the decree and the judgment the remedy by construction is only appropriate if the language of the decree is ambiguous. But when the language of the decree is plain and there is no ambiguity, the proper remedy is by an application for amendment of the decree to the court passing the decree. The executing court should not amend the decree under the guise of interpretation. 36 I.C. 500; 39 I.C. 597=1 Pat. L.W. 620. Where a decree is incomplete and ambiguous, it is not the duty of the executing Court to complete it and to give it a definite meaning. 13 A.L.J. 428=29 I.C. 213; 34 I.C. 344. An executing court can go behind the terms of a compromise decree and look at the terms of the compromise in accordance with which the decree was passed in order properly to understand what the decree was. 21 C.W.N. 835=37 I.C. 916. The words in the decree must be interpreted in conformity with the judgment and the court is bound to execute the decree as it stood. 75 P.W.R. 1916=32 I.C. 820. When a decree cannot be construed literally it cannot be executed at all. 59 P.W.R. 1918=44 I.C. 580. An executing Court can refuse to execute a decree against defendants who were not parties to the appeal and against whom the appellate Court granted relief, but

did not incorporate in the decree. 13 A.L.J. 136 = 27 I.C. 804. When two descriptions of the same subject-matter conflict with each other or when two parts of the same description are in conflict, that which is more certain, stable, and the least likely to have been mistaken or inserted inadvertently must prevail if it sufficiently identifies the subject-matter. 17 I.C. 256 = 25 O.C. 704. It is competent to a court executing a decree to interpret it. But once it decides that an interpretation thereof would be premature it is not competent to that court to interpret the decree, and any opinion expressed by it is not any adjudication binding on the parties. 57 I.C. 177. An executing court has only to interpret the decree under execution. It cannot go behind it or interpret it in a manner wholly repugnant to the tenor of the judgment on which it is based. 78 I.C. 639. When the defendants preferred a joint appeal from a decree against them and had the suit dismissed with all costs, and the plaintiff preferred a second appeal against one of the defendants only and got a decree against him, the other defendant is entitled only to a moiety of the costs awarded by the first appellate Court in favour of both the defendants. 17 C.P.L.R. 53. An executing Court's business is simply to interpret the decree as it stands and not to question its correctness. But it is at full liberty to refer to the judgment or any other document on the file in order correctly to interpret it, and when there is a divergence between the decree and the judgment the proper course is to direct the decree-holder to apply for amending the decree to the Court which originally passed it. 60 P.W.R. 1908. The executing court ought to give effect to the decree as it stands and ought not to read into it provisions which may be found in the award or in the judgment unless and until an amendment of the decree is obtained. 95 P.R. 1906. The Court executing a decree should refuse execution if the decree cannot be literally executed. 44 I.C. 530. It is unsafe and inexpedient for the executing court in a case where there can be no possible doubt to leave the question as to what was intended to be sold unsettled, when it is sure to be made an occasion for future dispute. 23 M.L.J. 97 = 14 I.C. 286. The Court should put such a construction upon the decree as would make it in accordance with law. 19 A. 174 ; 21 A. 361 ; 23 A. 220, 236. When one construction is put upon a decree the court is not competent to put subsequently another construction. 19 M. 54 ; 59 I.C. 25 = 5 Pat. L.J. 402. If the vesting of a part of the equity of redemption in the mortgagee is tantamount to a discharge or satisfaction of a proportionate part of the mortgage-debt, there is no reason why an executing Court should not recognise it and go into the extent to which the decree-holder has been satisfied. 42 A. 544. It is the duty of the executing court to ascertain the exact amount due to the decree-holder. 64 P.L.R. 1914 = 23 I.C. 471. When the decree is intelligible the executing court cannot refer to the judgment or allow costs not awarded by the decree. 13 P.R. 1886 ; 30 P.R. 1869 ; 15 P.R. 1866. An executing court has power to construe the decree in accordance with law. 2 Pat. L.J. 396. When the plaintiff's claim is inaccurately entered in the decree the executing court is not competent to examine the record and ascertain the actual existing circumstances. 59 I.C. 25 = 5 Pat. L.J. 402. A mortgage-decree giving a personal remedy before sale of the property though irregular, under the T. P. Act, cannot be questioned in execution proceedings. 27 M.L.J. 25 = 24 I.C. 195 ; 22 I.C. 293 ; 20 C.L.J. 512 = 27 I.C. 444 ; 39 M. 570.

THE COURT WHICH PASSED THE DECREE MAY EXECUTE IT AS FAR AS POSSIBLE OR MAY TRANSFER IT TO ANOTHER COURT UNDER THE CIRCUMSTANCES MENTIONED ABOVE.—The court is bound to execute the decree. 9 W.R. 346 ; 6 W.R. 346. It is open to an executing court to determine whether the decree which it is asked to execute is a subsisting and operative decree or not and if such decree has been superseded and is no longer operative the executing court can refuse execution on that ground. 17 C.W.N. 868 = 19 I.C. 630. The court has power to go on with the execution after transmission of the decree from the Collector.

18 I.C. 1004. The court cannot refuse to execute its own decree by ordering the sale of immoveable property merely because a third party happens to be in legal possession. 14 B. 369 ; or on the ground that it would be inequitable to execute it. 5 A. 58. The court of law should not show any desire to throw obstacles in the way of creditors obtaining payment of their just claims. At the same time the court must insist that the creditors in execution of their decrees shall proceed in a legal and proper manner. 28 O. 574. The court has power to cancel its order striking off the case. 1 B.L.R. 91 F.B.

VIII.—RESTRICTED POWERS OF COURTS EXECUTING TRANSFERRED DECREES.

POWERS IN EXECUTION.—The court executing a decree sent to it shall have the same powers in executing such decree as if it had been passed by itself. All persons disobeying or obstructing the execution of the decree shall be punishable by such court in the same manner as if it had passed the decree. And its orders in executing such decree shall be subject to the same rules in respect of appeal as if the decree had been passed by itself. (S. 42, C.P. Code.)

The court to which a decree is so sent shall cause such copies and certificates to be filed without any further proof of the decree or order for execution or of the copies thereof, unless the court for any special reasons to be recorded under the hand of the judge requires such proof. (O. 21, r. 7.)

The functions of the court are judicial and not ministerial. 7 B.H.C. 87.

THE COURT TO WHICH A DECREE IS SENT FOR EXECUTION CANNOT QUESTION THE LEGALITY OR PROPRIETY OF ORDER OF EXECUTION BY THE COURT THAT TRANSFERRED THE DECREE. 5 O. 736 ; 27 M.L.J. 398. See also O. 21, r. 7. 5 A. 53 ; 8 C. 687 ; 31 C. 922 ; 15 B. 644 ; 2 B. 109 ; 11 B. 528 ; 10 B. 65 ; 51 P.R. 1870 ; 7 A. 194 ; 21 W.R. 219 ; 21 B. 456 ; 13 W.R. 312 ; 5 O. 448 ; 8 B. 185 ; 5 W.R. 176 ; 9 W.R. 361 ; 21 W.R. 141 ; 21 B. 456 ; 11 I.C. 457. It cannot refuse execution on the ground that the order directing execution was wrong or improper. 21 B. 456 ; 7 A. 330 ; 5 C. 736. It cannot refuse execution on the ground that execution was barred by limitation on the date on which the order for execution was made. 15 B. 28 ; 21 W.R. 330. It cannot question the right of the transferee to execute the decree. 156 P.L.R. 1905 ; 21 W.R. 219. It cannot question the right to execution on the ground of discharge of the decree by payment made before the order of transfer or that property cannot be sold. 8 B. 185 ; 10 A. 130 ; 10 A. 132 ; 23 A. 181 ; 31 O. 922 ; 4 M. 324 ; 11 B. 528 ; 15 B. 307. It cannot question the amount certified as due. 9 W.R. 36. It cannot question the right of the person shown in the order as the person entitled to execute the decree. 21 W.R. 141 ; 21 W.R. 219. but if the transferring court has made no order for execution, and has merely transferred the decree for execution and sent a certificate of non-satisfaction, the court to which

the decree is sent has the power to decide whether execution is barred by time. 23 C. 39 ; 16 A. 990 ; 10 W.R. 10 F. B. ; 6 C.L.R. 489 ; 14 C. 50 ; 10 C. 748 ; 5 C. 897 ; 8 C. 916 ; 13 B.L.R. 98 ; 24 W.R. 151 ; 15 B. 28 ; 13 C. 257 ; 5 W. R. 14 ; 7 N.W.P. 114 ; 7 W.R. 19 ; 21 W.R. 292 ; 7 N.W.P. 151, or to entertain an objection impugning the right of the decree-holder to proceed against any property other than that charged in the decree. 27 I.C. 597=2 O.L.J. 18, or the Court may stay execution so as to leave the question to be determined by the Court which passed the decree under O. 21, r. 26. Under the C. P. Code the Court transmitting a decree is not the Court to decide objections on the part of the judgment-debtor that the decree is incapable of execution. 78 I.C. 1001. The Court to which a decree is transferred for execution has jurisdiction to entertain an objection preferred to the execution of the decree unless the matter has been expressly or impliedly decided between the parties. 46 A. 560. Neither the impleading of the Collector as a party to an execution proceeding as representing the Court of Wards which has taken over the superintendence of the judgment-debtor's estate, nor an order transferring the decree for execution amounts to a decision of the question whether the decree must be satisfied under S. 18 of the Court of Wards Act and the Collector can take an objection (*ibid*).

Certificate.—The mere fact that certain payments under the decree are notified to the Court which passed the decree does not amount to certification within the meaning of S. 41. 26 Bom. L.R. 345=80 I.C.

IT CANNOT TRANSFER THE DECREE SENT TO IT FOR EXECUTION TO SOME OTHER COURT. 3 C. 512 ; 21 W.R. 337 ; 129 P.R. 1879 ; 83 P.R. 1887. A District Munsiff receiving by transfer a decree of a village Court under S. 66 of Madras Act, I of 1889, or withdrawing execution of a decree to his own file under S. 67 has no jurisdiction to transfer it for execution to another District Munsiff's Court under S. 39 of the C.P. Code. 46 M. 734. If complete execution cannot be had in such district it is the business of the decree-holder to have his decree re-transmitted to the court which passed the decree and then to obtain a fresh certificate for transmission to another court. 21 W.R. 337 ; 3 C. 512.

IT CANNOT QUESTION THE JURISDICTION OF THE COURT WHICH PASSED THE DECREE.—7 B. 481 ; 10 B. 65 ; 8 C. 916 , 14 M.L.T. 96=20 I.C. 704 ; 22 B. 475 ; 38 B. 194 ; 24 I.C. 135 ; 14 C.P.L.R. 92 ; 10 C. 22. O. 21, r. 7, C. P. Code. 85 P.L.R. 1916=35 I.C. 867 ; 24 C.L.J. 375=35 I.C. 856. Under the old S. 225 of the C. P. Code of 1882 corresponding to O. 21, r. 7 the court had power to enquire whether the transmitting Court had jurisdiction to pass the decree or not. 15 B. 216, 219 ; 17 A. 478 ; 28 B. 378 ; 8 A. 377 ; though it was held that such power should not be exercised unless the defect appeared on the face of the decree. 10 W.R. 10 F.B. The words "or of the jurisdiction of the Court which passed the decree" which occurred after the words, "or the copies thereof" in the corresponding section of the old code have been omitted in the present rule 7 of O. 21.

SAME POWERS.—It cannot extend the scope of the decree. 10 M. 283 ; 5 A 53 ; 16 B. 644, 11 B. 537 ; 3 C. 161 P.C. ; 28 C. 353 P.C. The decree is to be regarded as a decree of that court for purposes of execution. 3 N.W.P. 168 ; 13 M.L.T. 227=17 I.C. 323. Such a court has power to exercise the powers mentioned in O. 21, r. 53. 7 S.L.R. 19=20 I.C. 540.

Power to issue notice.—The notice under O. 21, r. 22 may be served by such court and not necessarily by the court which passed it. 12 C.W.N. 897. When under O. 21, r. 6, a certificate is issued by the court passing the decree transferring it to another court for execution, notice to execute the decree can only be issued by the latter court and an application to the former court for issuing notice to the judgment-debtor, to show cause why execution should not issue against him is not in accordance

with law, or to take steps in execution. 68 I.C. 116 (C.) A decree transferred to a court for execution is to be regarded as a decree of that court for purposes of execution. 3 N.W.P. 168. Where no future interest is allowed by the decree, such a court cannot allow it to be realised in execution even though the judgment-debtor does not appear to oppose the execution proceedings. 4 Pat. 440=1925 Pat. 807. The functions of the High Court in respect of execution of transferred decrees are limited to effecting execution and to the matters arising out of the proceedings in execution. 6 Bom.L.R. 66.

APPLICATION FOR EXECUTION TO THE COURT.—Such a court cannot execute the decree unless a regular application is made to it under O. 21, rr. 10 and 11 C.P. Code, 80 I.C. 59. When once an order is made transferring the decree, that by itself is sufficient to enable the decree-holder to apply to that court. 8 I.C. 852; 16 B. 683; dissented from in 21 O. 200. Such a court is not competent to execute the decree before a copy of the decree is received; but when once an order is made sending the decree to another court for execution, that by itself is sufficient to entitle the decree-holder to apply to the court to which the decree is sent for rateable distribution under S. 73. 21 M.L.J. 505=8 I.C. 852. After the certification under S. 41 the court has no power to execute the decree. 3 O.W.N. 211. Where the decree has not actually been sent to another court the court which passed the decree has jurisdiction to execute it. 3 Pat. L.T. 298=65 I.C. 332.

FRESH APPLICATION FOR EXECUTION.—When a decree has been transferred for execution there is nothing in law which compels the decree-holder to make a second application for execution in the Court to which the decree has been transferred if an application has already been made to the court which passed the decree. 2 Pat. 909=74 I.C. 753. The proper court for entertaining an application to bring the petitioner on record as the representative of the judgment-debtor in order that he may raise a question covered by S. 47 is the executing court and not the court which passed the decree. 11 L.W. 173=55 I.C. 812.

APPEALS.—When a decree of a Small Cause Court is transferred for execution to the Court of a Munsiff exercising ordinary jurisdiction, an appeal from the order of the latter Court in execution lies to the District Judge. 20 C.L.J. 129; 11 O.W.N. 861; 14 A.L.J. 415=33 I.C. 523; 3 P.L.R. 1905; 1925 M. 1179=22 L.W. 455. An order for the arrest of a surety by an ordinary court in execution of a Small Cause decree transferred to it for execution is appealable under Ss. 42 and 47 of the C.P. Code. 20 L.L.J. 129=19 O.W.N. 1085=27 I.C. 10. Only one appeal lies from an order in execution of a Small Cause decree transferred to the regular side for execution against immoveable property because in Small Cause suits there is only one appeal. 37 M.L.J. 303; 11 O.W.N. 861; 12 I.C. 959=(1911) 2 M.W.N. 585. An appeal from the order in execution of a Sub-Court lies to the District Court, and not to the High Court. 39 I.C. 772=5 L.W. 264; 23 A.L.J. 961. And when the appeal is wrongly presented to the High Court, it may be returned for presentation to the proper Court and not dismissed altogether (*ibid*).

SUCH A COURT CANNOT ENTERTAIN AN APPLICATION BY THE JUDGMENT-DEBTOR TO BE DECLARED AN INSOLVENT.—It is left to the Court that passed the decree to do so, O. 21, r. 55. 11 M. 301; 6 B. 584.

IT CANNOT ENTERTAIN AN APPLICATION FOR EXECUTION BY THE TRANSFEREE OR ASSIGNEE OF THE DECREE UNDER O. 21, R. 16, C. P. CODE.—Such an application must be made only to the Court that passed the decree, O. 21, r. 16; 55 I.C. 156; 2 A. 283; 25 A. 443; 27 O. 488; 14 W.R. 65; 9 B. 46; 21 W.R. 141; 13 O.W.N. 553=9 O.L.J. 443. An order passed on such an application is without jurisdiction. 27 O. 488.

IT CAN STAY EXECUTION OF THE DECREE UNDER CERTAIN CIRCUMSTANCES ONLY.—See "Stay of execution."

IT CANNOT ORDER EXECUTION AGAINST THE LEGAL REPRESENTATIVE OF THE DECEASED JUDGMENT-DEBTOR without an order to that effect from the Court that passed the decree. See S. 50, C. P. Code in Chapter III, 55 I.C. 156 ; 87 I.C. 21=1925 O. 448. The fact that the application is not made to the Court which passed the decree is a mere irregularity and is covered by S. 99, C. P. Code. 90 I.C. 1050=26 P.L.R. 740 ; 87 I.C. 21=28 O.C. 380. The Court to which a decree for the sale of immoveable property is transmitted for execution has no power to pass a supplementary decree. The power of passing such a decree after judicial determination of the question of the liability of the mortgagor is in the Court in which the mortgage suit was originally instituted. 33 M.L.J. 382=42 I.C. 953. The Court to which a decree is sent for execution is competent to persevere with the execution until it is made to appear either that satisfaction has been obtained or that execution is no longer possible. 21 O.C. 261=48 I.C. 722. An omission to take steps within six months provided by the Civil Rules of Practice, Madras, does not render the proceedings taken after six months, infructuous and void *ab initio*. In such cases time is not the essence of the stipulation. The rules are not an adjunct to the C. P. Code, but merely rules of convenience to ensure speedy execution of the decree. 39 M. 485. When a decree is transferred to the District Court which transferred the decree to the Court of the Subordinate Judge the decree-holder cannot have a further period of six months from the date of the transfer to the latter Court. 28 M.L.J. 172=29 I.C. 119. The Court to which a decree is transferred for execution has jurisdiction to execute it only up to the time of issuing the certificate under S. 41. After making such a certificate the Court has no such power and in such a case the application for execution must be made to the Court which passed the decree. 85 I.C. 390=22 A.L.J. 1039.

IX.—CONTINUATION OF POWERS OF COURTS EXECUTING TRANSFERRED DECREES.

The Court to which a decree is sent for execution retains its jurisdiction to execute the decree until, (a) the execution has been withdrawn from it, or (b) it has executed the decree and has certified the fact to the Court which passed the decree, or (c) it has failed to execute the decree and has certified the fact to the Court which passed the decree : S. 41 C. P. Code. 25 Bom. L.R. 453=74 I.C. 149 ; 20 A. 129 ; 9 C.L.J. 289 ; 84 I.C. 99=1925 O. 428 ; 28 O.C. 169 ; 1926 Pat. 274.

DISMISSAL OF APPLICATION.—If an application is made under O. 21, r. 10 to the Court executing a transferred decree and is rejected on account of some informality, a second application lies to the same Court. It does not cease to have jurisdiction to entertain it. 20 A. 129 ; A.W.N. (1883) 247 ; *contra* was held in 6 W.R. 47. A fresh certificate is not necessary in such a case (*ibid*). Certification to the Court that passed the decree is very important and it puts an end to the jurisdiction of such Court. 26 Bom. L.R. 345=80 I.C. 752.

WHEN A CERTIFICATE IS TO BE SENT.—If an application for execution fails the judgment-creditor is still entitled to a fresh execution of his decree. It is only when the Court to which a decree is sent has executed it that the Court is bound to send a certificate under S. 41. There should be a complete failure such as would result in no benefit to the judgment-creditor for one reason or other and not merely a partial failure. 74 I.C. 149=25 Bom. L.R. 453. The sending of a certificate of the result of each application as required by the rules and orders of a certain High Court does not put an end to the jurisdiction of the Court to which the decree is sent for execution. 1922 N. 10=68 I.C. 657.

X.—POWERS OF THE COURT THAT PASSED THE DECREE AFTER IT HAS TRANSFERRED IT FOR EXECUTION TO ANOTHER COURT.

The Court which passed a decree does not become *functus officio* merely because it has sent that decree for execution to another Court. There are some applications which can only be made to the Court which passed the decree. 18 O.P.L.R. 169. After a decree is sent for execution to another Court the transmitting Court has no jurisdiction to entertain an application for execution before it is certified and returned unless, a concurrent execution was ordered or proceedings in the Court to which the decree is sent are stayed for the purpose of executing the decree by the Court which passed the decree. 37 M. 291; confirmed on appeal in 39 M. 640 P.O.; 49 P.R. 1869; A.W.N. (1886) 31. A transferee of decree must apply for execution to the Court which passed the decree, although the decree is sent for execution to another Court. 2 A. 283; 9 B.H.C. 49. An application for execution after the judgment-debtor dies and the decree is not fully executed, must be made to the Court which passed the decree: S. 50 C. P. Code, even if the decree was sent for execution to another Court. 18 B. 224; 1 A. 431; 28 M. 466 F.B.; 9 O.L.J. 239; 17 A. 431. A contrary view is taken by the Calcutta High Court and held that in such a case the application for execution may be made to the Court to which the decree is sent for execution. 22 O. 558. Even according to the Madras High Court where the application for execution is made to the Court to which the decree is sent for execution and the legal representative is placed on the record by such Court and the sale of the property held by it; the sale cannot be set aside on that ground; it is a mere irregularity. 38 M. 1076. The fact that the decree is transferred for execution to another Court does not divest the Court which passed the decree of the jurisdiction which it alone enjoys of making an order of transfer. An application for an order for the issue of a certificate to a second Court lies to that Court and such a Court has power to re-transfer the decree to the same Court after a certificate of non-satisfaction from it under S. 41. 1926 L. 113=89 I.O. 958. The fact that the decree has been transferred to another Court for execution will not deprive the Court which transferred the decree, of jurisdiction to decide whether or not the execution has been barred by limitation. 13 O. 257. A decree sent for execution to another district cannot be recalled on the application of a third party. 11 W.R. 557. The Court which makes an order transferring its decree for execution to another Court has power to bring the decree back. 1926 Bom. 271=28 Bom.L.R. 381.

ORDER OF THE COURT WHICH PASSED THE DECREE OR OF APPELLATE COURT TO BE BINDING UPON THE COURT APPLIED TO.—Any order of the Court by which the decree was passed or of such Court of Appeal as aforesaid, in relation to the execution of such decree shall be binding upon the Court to which the decree was sent for execution. (O. 21, r. 28).

SCOPE. Any order of the Court which passed the decree in relation to the execution of such decree is binding on the Court to which, the decree is transferred for execution, 7 A. 73. The delegation of the powers of the Court which passed the decree to the Court to which the decree is transferred for execution is not complete. It does not divest the Court which passed the decree of its powers and functions; especially under rr. 26 and 28 of O. 21 the Court has certain powers, 7 A. 73.

XI.—GENERAL POWERS OF WITHDRAWAL AND TRANSFER.

S. 24, C.P. CODE.—(1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court or the District Court may at any stage,

- (a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same, or
- (b) withdraw any suit, appeal or other proceeding pending in any court, subordinate to it, and
 - (i) try and dispose of the same, or
 - (ii) transfer the same for trial or disposal to any Court subordinate to it and competent to try and dispose of the same, or
 - (iii) re-transfer the same for trial or disposal to the Court from which it was withdrawn.

(2) When any suit or proceeding has been transferred or withdrawn under sub-S. (1) the Court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either re-try it, or proceed from the point at which it was transferred or withdrawn.

(3) For the purposes of this section, the Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court.

(4) The Court trying any suit transferred or withdrawn under this section from a Court of Small Causes shall for the purposes of such suit be deemed to be a Court of Small Causes.

S. 25, C.P. CODE.—(1) Where any party to a suit, appeal or other proceeding pending in a High Court presided over by a single judge objects to its being heard by him and the judge is satisfied that there are reasonable grounds for the objection, he shall make a report to the Governor General in-

Council, who may by notification in the Gazette of India transfer such suit or other proceeding to any other High Court.

(2) The law applicable to any suit, appeal or other proceeding shall be the law which the Court in which the suit, appeal or proceeding was originally instituted ought to have applied to such case.

When a whole case for execution as distinguished from the decree to be executed is transferred by the District Judge under S. 24, C.P. Code, the Court to which the case is transferred has jurisdiction to execute it. 1 Pat. L.W. 582=39 I.C. 737. When the Small Cause Court has no jurisdiction over the subject-matter of the decree the order of the executing Court is invalid. 17 O.P.L.R. 51. Under S. 24 (1) (b) a Court has power to withdraw to its own file a transmitted execution proceeding and to dispose of it. 39 M. 485 ; 1 A. 180 F.B. ; 5 B. 680. S. 24, C.P. Code applies to execution proceedings. 22 B. 778 ; 39 M. 485 ; 1925 A. 276 ; 1926 M. 421=50 M.L.J. 161.

XII.—PROCEDURE IN TRANSFERRING DECREES FOR EXECUTION.

MODE OF TRANSFER.—(a) Transfer to Court of Small Causes.—Where a decree has been passed in a suit of which the value as set forth in the plaint did not exceed two thousand Rupees, and which as regards its subject-matter is not exempted by the law for the time being in force from the cognizance of either a Presidency or a Provincial Court of Small Causes and the Court which passed it wishes it to be executed in Calcutta, Madras, Bombay or Rangoon, such Court may send to the Court of Small causes in Calcutta Madras, Bombay or Rangoon, as the case may be, the copies and certificates, mentioned in rule 6, and such Court of Small Causes shall thereupon execute the decree as if it had been passed by itself. (O. 21, r. 4).

(b) Where the Court to which the decree is to be sent for execution is situate within the same district as the Court which passed such decree, such Court shall send the same directly to the former Court. (O. 21, r. 5).

15 M. 345.

(c) When the Court to which the decree is to be sent for execution is situate in a different district, the Court which passed it shall send it to the District Court of the district in which the decree is to be executed, (O. 21, r. 5). In such

cases the District Court may either execute the decree itself or transfer it for execution to any subordinate Court of competent jurisdiction. (O. 21, r. 8).

SIGNATURE OF THE DISTRICT JUDGE.—An order of transfer of the decree need not be signed by the Judge. It is sufficient if it is issued with his authority. 23 O. 480. A signature of the sarishtadar is sufficient and valid. 5 I.C. 155 ; 7 M. 397 ; 17 M. 309 (16 C. 457 and 12 B. 155 not followed).

PROPER CHANNELS.—When an application for execution is not sent through proper channels but directly to the court desired to execute the decree, the court has no jurisdiction to execute the decree. 22 O. 764. And the proper course for the court to which the decree is transferred is to return the papers to the transferring Court and not to dismiss the application. Such an order of dismissal should be set aside. 22 I.C. 682. Such an application for execution is in accordance with law under Art. 182 (5) of the Limitation Act, the decree-holder not being responsible for the mistake committed by the transferring Court. 1 Pat. L.T. 386.

“ District ” means the local limits of the jurisdiction of a principal civil court of original jurisdiction hereafter called the “ District Court ” and includes the local limits of the ordinary original civil jurisdiction of a High Court. S. 2 (4), C. P. Code.

Hence under this clause the decree may be sent for execution to any Court to which the Code applies. It is not limited to Courts within the limits of any single province. An Assistant Judge invested with all the powers of a District Judge is a District Court. 7 B.H.C. A.C. 37.

(d) Where the Court to which a decree is sent for execution is a High Court, the decree shall be executed by such Court in the same manner as if it had been passed by such court in the exercise of its ordinary original civil jurisdiction. (O. 21, r. 9).

A decree passed by a Zillah Court and transmitted to the High Court for execution was duly executed by it. 2 N.W.P. 399 ; 1 Ind. Jur. N.S. 189.

(e) When the Court to which the decree is to be sent for execution is situate in foreign territory it may be sent directly to such Court. (See S. 45).

Courts in British India have no power to send their decrees for execution to Travancore Courts ; but may and should send to these courts the documents they require to enable them to execute these decrees under the powers conferred upon them by the Legislative authority in Travancore. 40 M. 1069 F.B.

WHAT PAPERS SHOULD BE SENT.—The Court executing a decree for execution shall send :—

- (a) a copy of the decree ;
- (b) a certificate setting forth that satisfaction of the decree has not been obtained by execution within the jurisdiction of the Court by which it was passed, or where the decree has been executed in part, the extent to which satisfaction has been obtained, and what part of the decree remains unsatisfied ; and
- (c) a copy of any order for the execution of the decree ; or if no such order has been made, a certificate to that effect. (O. 21, r. 6).

4 M.H.O, 331.

The executing Court shall see that the requirements of rule 6 have been strictly complied with. 4 M. 331. Omission to transmit the certificates to the Court executing the decree is not a material irregularity within the meaning of O. 21, r. 90. Hence it is not a good ground for setting aside a sale in execution by such Court. 20 M. 10. A fresh certificate is not necessary after the case is struck off after partial execution. 20 A. 129 ; A.W.N. (1883) 247.

COPY OF ANY ORDER OF EXECUTION.—An order for execution means a subsisting order. 13 B. 371. A Court to which a decree is sent for execution may not be competent to execute it before a copy of the decree is received. But when once an order is made sending a decree to another Court for execution, that by itself is sufficient to entitle the decree-holder to apply to the Court for rateable distribution of assets under S. 73, C.P. Code. 21 M.L.J. 505=8 I.O. 853. A transfer of a part of the decree is irregular and cannot be held to be binding on the judgment-debtors who had no notice of the application and the court was right in treating the transfer as if it were a transfer of the whole decree. 43 I.O. 186 ; 3 Pat. L.W. 257.

THE COURT RECEIVING COPIES OF DECREE ETC. TO FILE SAME WITHOUT PROOF.—The Court to which a decree is so sent shall cause such copies and certificates to be filed without any further proof of the decree or order for execution or of the copies thereof, unless the Court for any special reasons to be recorded under the hand of the Judge requires such proof. (O. 21, r. 7).

RESULT OF EXECUTION PROCEEDINGS TO BE CERTIFIED.—The Court to which a decree is sent for execution shall certify to the Court which passed it the fact of such execution, or when

the former Court fails to execute the same, the circumstances attending such failure. (S. 41).

There is no particular prescribed mode in which the Court to which the decree was sent for execution should inform the Court as regards the results of the same. When a Court has both small cause powers and original jurisdiction and a decree passed under the former is executed under the latter and an entry of satisfaction is made in the Small Cause Register, S. 41 has been complied with. 1923 Bom. 371.

ADDITIONAL RULE MADE BY THE ALLAHABAD HIGH COURT.—O. 21, r. 104.—Where the certificate prescribed by S. 41 is received by the Court which sent the decree for execution, it shall cause the necessary details as to the result of execution to be entered in its register of civil suits before the papers are transmitted to the record room.

CHAPTER II-A

EXECUTION OF DECREES BY COLLECTOR

POWER TO PRESCRIBE RULES FOR TRANSFERRING TO COLLECTOR EXECUTION OF CERTAIN DECREES.—The local Government may, with the previous sanction of the Governor General in Council declare by notification in the local official Gazettee, that in any local area the execution of decrees in cases in which a Court has ordered any immoveable property to be sold, or the execution of any particular kind of such decrees, or the execution of decrees ordering the sale of any particular kind of or interest in immoveable property, shall be transferred to the Collector. (S. 68).

OBJECT.—The object of the provisions under this chapter is to lay down rules of procedure by which the chief executive officer of the District would be enabled to liquidate the debts of the encumbered land-holders without the immediate sales of their estates and so to preserve the old landed gentry, and to deal with the property in the best interests of the parties concerned. 11 A. 94 ; 9 C. 290.

SCOPE.—Effect cannot be given to the rules prescribed by the Local Governments under Ss. 68 and 70 unless an order for sale has been made after the date on which the notification takes effect. 4 A. 116 F.B. The rules framed under these sections have no retrospective effect. 15 B. 392 ; 15 B. 694 ; 17 B. 289. Execution of a decree cannot be transferred to the Collector under this section unless the land is liable to sale. 1926 A. 339—93 I.C. 1020 ; 42 A. 142.

APPLICABILITY.—No rules under S. 68 are prescribed in the Punjab and the only provision applicable is under S. 72 of temporary alienation. 8 P.R. 1917 Rev. ; 1 P.R. 1919 (Rev) ; 1 L. 192 F.B.

POWERS OF THE COLLECTOR OR COURT.—Application for leave to bid.—When proceedings in execution of a decree have been transferred to a Collector,

the application for leave to bid at the auction sale should be made to him under cl. 9 sub-cl. (16) of the Bombay Civil Circulars, Chapter II. After such transfer the civil Court has no power to entertain the application under O. 21, r. 72, C. P. Code nor can it permit a set-off. 42 B. 221.

Power of the Collector to dismiss Execution Proceedings.—A Collector to whom a Civil Court's decree has been transferred for execution has no power to make an order which would by analogy have the effect of an order under S. 158 of the Code of 1882 (O. 17, r. 19, New Code), dismissing a suit and would finally determine all proceedings in execution of the decree. A.W.N. (1893) 28. The functions of the satisfaction, discharge or execution of the decree vest in the Court. 1 L. 192.

Sale of Ancestral Property.—An ancestral grove or garden with a house standing thereon cannot be sold in execution of a decree by the Amin of the Court but the Court must transfer the decree to the Collector under S. 68 of the C.P. Code (under the General Rules for the Civil Courts) who alone has jurisdiction to execute the decree against such property and bring the same to sale. A sale held by the Court itself is without jurisdiction and must be set aside, 36 A. 33; 18 A. 141. When the property to be sold is ancestral the Civil Court should transfer the decree for execution to the Collector so far as regards the ancestral land is concerned. 23 A. 631; 11 A.L.J. 1009; 7 A. 402; 4 A. 115 F.B.; 18 A. 141; 14 O.C. 115. A suit to set aside a sale held by the Collector on the ground that the property was ancestral and that the real purchaser was the decree-holder without obtaining the leave of the Court to bid is barred by S. 47. 22 A. 108. A suit to set aside a sale of ancestral property held and confirmed by a Collector under the rules framed under these sections, does not lie. 45 A. 275.

Partition of Property.—When a decree for joint possession of an estate assessed to revenue is sent to the Collector, he is not only to make allotment but to complete the partition by delivery of possession. 56 I.C. 806.

Restoration of case dismissed for default.—When the Collector has dismissed for default an execution case sent to him he has no jurisdiction to restore it. Subsequent proceedings in respect of the case are void. 51 I.C. 237.

Execution of decrees.—When a declaration has been made under S. 68, the Civil Courts have no jurisdiction to execute the decree. 4 A. 382. The Collector has full power to proceed with the sale or to adopt any of the methods laid down in Schedule III for the satisfaction of the decree transferred to him for execution. 45 I.C. 485—7 O.L.J. 11; 46 A. 414. It is within the jurisdiction of the Collector to mortgage a portion of the property in satisfaction of a mortgage decree. 27 Bom. L.R. 217.

Objections to attachment and sale.—The collector has no power to decide objections to attachment or sale or whether the property has been properly attached. 20 A. 428.

Confirmation of sale.—When a revenue court confirms a sale of ancestral property in execution proceedings transferred to it under S. 68, C.P. Code, a suit to set aside the sale is not maintainable. The order is final under O. 21, r. 92, 18 A. J.J. 124—54 I. C. 801. It is in the power of the court to confirm a sale effected by the collector. 83 P.R. 1896; 11 B. 478.

Setting aside sales.—The power of setting aside sales under O. 21, r. 89 or r. 90 continues in the court notwithstanding the transfer of the execution to the collector. 31 B. 207; 25 A. 167; 23 B. 531; 15 B. 922; 15 B. 694. The rules

prescribed by the Local Government of N.W.P. provide for a sale being set aside under O. 21, r. 90 by the collector except on the ground of fraud. 26 A. 101. An application to set aside a sale on the ground of material irregularity should be made to the collector. 5 A. 314. An application under O. 21, r. 91, to set aside a sale on the ground that the judgment-debtor had no saleable interest in the property sold is entertainable not by the collector, but by the Civil Court. 9 A. 43 ; 11 A. 94 ; 12 A. 564 at page 568.

ADDITIONAL RULE MADE BY THE BOMBAY HIGH COURT.—O. 21, r. 91 A.—Where the execution of a decree has been transferred to the Collector and the sale has been conducted by the Collector or by an officer subordinate to the collector, an application under rr. 89, 90, or 91 and in the case of an application under r. 89, the deposit required by that rule, if made to the Collector or the officer to whom the decree is referred for execution in accordance with any rule framed by the Local Government under S. 70 of the Code, shall be deemed to have been made to or in the court within the meaning of rr. 89, 90 and 91.

Civil Courts are precluded from interfering in any matter declared by notification to be within the Collector's jurisdiction. 4 A. 382 ; 14 Bom. L.R. 787.

Power to postpone sale.—The court transferring the decree in such a case has no power to postpone sale. It is only the Collector who can do it. 22 A. 108 ; 16 A. 228.

Application under O. 21, r. 2.—An application under O. 21, r. 2, should be made to the Collector for adjustment. 35 B. 516 ; 16 A. 228.

Distribution of sale proceeds.—The Collector is not competent to distribute the money realised in execution of such a decree in contravention of an order of the court indicating the mode of distribution. 16 A. 1.

Delivery of possession.—Where a decree was sent to the Collector for execution under S. 68, O. P. Code, the collector put up the property for sale, sold it and gave the purchaser a sale certificate. The auction-purchaser was obstructed by a person claiming to be in possession in his own right. The Collector removed him from the property as he had power under r. 14 (1), made under S. 70, O. P. Code. The obstructor went to the court which passed the decree and obtained from it an order under O. 21, r. 101 ; held that the order of the court was within its jurisdiction and that it was properly made. 38 B. 673.

Income of property.—By Para 1 of Sch. III the Collector is in charge of the income of the property and the civil court cannot interfere with it so long as the Collector is in a position to exercise the power conferred on him by the Code. 87 I.C. 21—28 O.C. 330.

Appeal.—No appeal lies to the High Court from an order passed by the Collector in execution proceedings transferred to him under S. 70, O. P. Code. An appeal from the order of the Collector lies to such authorities as the Local Government may by rules prescribe. 7 Bom. L.R. 683 ; 5 A. 314 F.B. ; 6 A.W.N. 168 ; 11 A. 94 F.B. ; 13 A. 437 ; 12 A. 564 ; 5 N.L.R. 121.

Revision.—No revision lies to the High Court from an order of the Collector, in an execution proceeding transferred to him under S. 68, sanction in prosecution of a party under S. 476, Cr. P.C. 39 A. 91 ; 37 A. 394.

Civil Court's power over Collectors' proceedings.—In accordance with r. 9 of Ch. IV of the General Rules for Subordinate Courts the Civil Court is not

concerned with and cannot decide whether the order of the Collector or his proceeding in execution was good or bad. 19 A.L.J. 282. The Court is not on transferring the decree for execution to the Collector, deprived, of the judicial powers with respect to it. The Court may recall its record. 7 B. 332 ; 11 B. 478. When a decree is transferred to the Collector, he acts ministerially. 7 B. 332. The Court ought not to interfere unless requested by one of the parties. 8 B. 301 ; 5 A. 314 ; P.J. 1882 page 64. So far as the machinery for the satisfaction of the decree is concerned the Collector is the sole authority. The discretion is his and no Court can interfere, but it is the Civil Court alone that can determine the question judicially. 14 Bom. L.R. 787 ; 11 A. 94 ; A Civil Court has no power to interfere with the procedure of a Collector in the execution of a decree which has been transferred to him under S. 68. 46 A. 562. But the Civil Court is not deprived of its ordinary jurisdiction in regard to other matters because the decree has been sent to the Collector. 46 I. C. 885 ; 46 A. 562.

Court.—The word "Court" referred to in sub-S. (2) of S. 70 refers to the court alluded to in the previous portion of the section. It means the court to which the application for execution was made and which transferred the decree for execution to the Collector. S. 70 (2) does not take away the jurisdiction of any Court other than the Court referred to in the section. 2 A. 379.

Suit to set aside Collector's order.—A suit lies to set aside the order of the Collector exercising powers under Ss. 68 to 71 and the Civil Courts are not deprived of jurisdiction to entertain such a suit, where a suit would lie to set aside an order made by a Court executing a decree. 3 A. 206 ; 20 A. 379 ; 47 A. 217. A suit lies in a Civil Court for confirmation of a sale held in execution of a decree by a Collector. 9 A. 602 ; 20 A. 379 ; 3 A. 554 ; 24 A. 467 ; 19 B. 216. A suit to set aside a sale of ancestral property when the decree-holder was alleged to be the purchaser as benami without the leave of the court to bid is barred under S. 47. 22 A. 108 ; but see 47 A. 217 ; 42 A. 275.

Determination whether the decree is satisfied.—The Collector has no discretion to decide whether the decree has been satisfied. 37 B. 32.

Order as to payment by instalments.—A Collector to whom a decree is transferred for execution, cannot order the payment of a decree by instalments, 7 B. 382 ; 31 B. 120.

Termination of Collector's power.—When the decree transferred to the Collector for execution is satisfied the powers of the Collector come to an end. 78 I.C. 270 ; 35 B. 516. The powers of the Collector exist till the confirmation of sale. 60 I. C. 310—16 N.L.R. 194.

PROVISIONS OF THIRD SCHEDULE TO APPLY.—The provisions set forth in the third schedule shall apply to all cases in which the execution of a decree has been transferred under the last preceding section. (S. 69).

RULES OF PROCEDURE.—(1) The Local Government may make rules consistent with the aforesaid provisions,—

(a) for the transmission of the decree from the Court to the Collector and for regulating the procedure of the Collector, and his subordinates in

executing the same, and for transmitting the decree from the Collector to the Court ;

- (b) conferring upon the Collector or any gazetted subordinate of the Collector all or any of the powers which the court might exercise in the execution of the decree, if the execution thereof had not been transferred to the Collector ;
- (c) providing for orders made by the Collector or any gazetted subordinate of the collector, or orders made on appeal with respect to such orders, being subject to appeal and revision by supreme revenue authorities, as nearly as may be, the orders made by the court or orders made on appeal with respect to such orders would be subject to appeal and revision by appellate or revisional Court under this code or other law for the time being in force if the decree had not been transferred to the Collector.

JURISDICTION OF CIVIL COURTS.—(2) A power conferred by rules made under sub-section (1) upon the Collector or any gazetted subordinate of the Collector, or upon any appellate or revisional authority, shall not be exercisable by the court or by any court in exercise of any appellate or revisional jurisdiction which it has with respect to decrees or orders of the court. (S. 70).

COLLECTOR DEEMED TO BE ACTING JUDICIALLY.—In executing a decree transferred to the Collector under section 68 the Collector and his subordinates shall be deemed to be acting judicially. (S. 71).

The functions of a Collector in executing a decree transferred to him under these rules are purely ministerial. 54 I.O. 564 = 22 O.C. 319.

WHEN COURT MAY AUTHORISE COLLECTOR TO STAY PUBLIC SALE OF LAND.—(1) When in any local area in which no declaration under section 68 is in force, the property attached consists

of land or of a share in land, and the Collector represents to the Court that the public sale of the land or share is objectionable and that satisfaction of the decree may be made within a reasonable period by a temporary alienation of the land or a share, the court may authorise the Collector to provide for such satisfaction in the manner recommended by him instead of proceeding to a sale of the land or share.

(2) In every such case the provisions of sections 69 to 71 and any rules made in pursuance thereof shall apply so far as they are applicable (S. 72).

SCOPE.—This section admits only of a temporary alienation of land and not of an arrangement by which possession is left with the judgment-debtor subject to a payment of the judgment-debt by instalments. 6 N.W.P. 39; 2 N.W.P. H.C.R. 347; 2 N.W.P. 59; 31 B. 120. The section does not apply to decrees directing sale of land or of a share therein. 2 A. 856.

TEMPORARY ALIENATION.—The Collector has under S. 72 of the C.P. Code jurisdiction to make a proposal for a temporary alienation or otherwise of land belonging to the judgment-debtor in execution of the decree, notwithstanding the fact that the judgment-debtor is an agriculturist and sale is forbidden under S. 16 (1) of the Punjab Alienation of Land Act. 1 P.R. 1919 (Rev); 4 P.R. 1903; 8 P.R. 1917 (Rev). A sale in execution of a decree of land belonging to a member of an agricultural tribe is illegal under S. 16 (1) of the Punjab Alienation of Land Act. 8 P.R. 1917 (Rev); 1 P.R. 1919 (Rev); 1 L. 192 F.B.; 4 L. L.J. 476. A temporary alienation of land of a judgment-debtor who is a member of an agricultural tribe may be ordered by a civil court. S. 16 of the Land Alienation Act (Punjab) does not prohibit such an alienation. 1 L. 192 F.B.; 4 L. L.J. 476. The Collector acting under this section is merely a ministerial officer and it is perfectly within the discretion of the civil court to accept or not the representation of the Collector. 9 C. 290; 1 L. 192; 63 P.R. 1906; 25 P.R. 1894=27 I.O. 630=9 P.L.R. 1915.

COLLECTOR.—The S.D.O. who is directed by the Collector to carry out the execution is not the Collector under the General Clauses Act. 9 P.L.R. 1915=27 I.C. 630.

ACTION OF THE COLLECTOR ONLY ADMINISTRATIVE.—The Collector when acting under S. 72, C.P. Code does not perform any judicial function. If he makes any representation under the section he does so as an officer of the Court that may accept or refuse to accept the representation. 1 L. 192 F.B.; 25 P.R. 1894. The refusal of the Collector to take action under S. 72 is wrong, and the Civil Court should not accept the position taken up by the Collector. 52 I.O. 356. The civil courts have a discretion in the matter which can be exercised only upon materials on the record. It is open to the decree-holder to prove by evidence that the proposal of the Collector is not feasible or practicable and the Court should not decline to receive the evidence. 9 C. 290 F.B. It is perfectly in the discretion of the Court whether or not to sanction the proposal put forth by the Collector. 9 C. 290 F.B.

APPEAL.—No appeal lies from an act of the Collector in refusing to intervene after attachment of land. 5 P.R. 1910.

THE THIRD SCHEDULE.

1. POWERS OF COLLECTOR—Where the execution of a decree has been transferred to the Collector under section 68, he may,—

- (a) proceed as the Court would proceed when the sale of immoveable property is postponed in order to enable the judgment-debtor to raise the amount of the decree; or
- (b) raise the amount of the decree by letting in perpetuity or for a term on payment of a premium or by mortgaging the whole or any part of the property ordered to be sold; or
- (c) sell the property ordered to be sold or so much thereof as may be necessary.

POWER TO ORDER MORTGAGE.—The Collector has power under this schedule to mortgage a portion of the property in satisfaction of a mortgage-decree. 86 I.C. 846—27 Bom. L.R. 217.

2. PROCEDURE OF COLLECTOR IN SPECIAL CASES.—Where the execution of a decree, not being a decree ordering the sale of immoveable property in pursuance of a contract specially affecting the same, but being a decree for the payment of money in satisfaction of which the court has ordered the sale of immoveable property, has been so transferred, the Collector, if after such enquiry as he thinks necessary he has reason to believe that all the liabilities of the judgment-debtor can be discharged without a sale of the whole of his available immoveable property, may proceed as hereinafter provided.

3. NOTICE TO BE GIVEN TO DECREE HOLDER AND TO PERSONS HAVING CLAIMS ON PROPERTY.—(1) In any such case as is referred to in paragraph 2, the Collector shall publish a notice, allowing a period of sixty days from the date of its publication for compliance and calling upon—

- (a) every person holding a decree for the payment of money against the judgment-debtor, capable

of execution by sale of his immoveable property, and which such decree-holder desires to have so executed, and every holder of a decree for the payment of money in execution of which proceedings for the sale of such property are pending, to produce before the Collector a copy of the decree, and a certificate from the court which passed or is executing the same, declaring the amount recoverable thereunder;

(b) every person having any claim on the said property, to submit to the Collector a statement of such claim and to produce the documents (if any) by which it is evidenced.

(2) Such notice shall be published by being affixed on a conspicuous part of the court-house of the court which made the original order for sale and in such other places (if any) as the Collector thinks fit; and where the address of any such decree-holder or claimant is known, a copy of the notice shall be sent to him by post or otherwise.

4. AMOUNT OF DECREES FOR PAYMENT OF MONEY TO BE ASCERTAINED, AND IMMOVEABLE PROPERTY AVAILABLE FOR THEIR SATISFACTION.—(1) Upon the expiration of the said period, the Collector shall appoint a day for hearing any representation which the judgment-debtor and the decree-holder or claimants (if any), may desire to make, and for holding such enquiry as he may deem necessary for informing himself as to the nature and extent of such decrees and claims and of the judgment-debtor's immoveable property, and may from time to time adjourn such hearing and enquiry.

(2) When there is no dispute as to the fact or extent of the liability of the judgment-debtor to any of the decrees or claims of which the Collector is informed or as to the relative priorities of such decrees or claims, or as to the liability of such property for the satisfaction of such decrees, the Collector shall draw up a statement specifying the amount to be recovered for the discharge of such decrees, the order in

which such decrees and claims are to be satisfied, and the immoveable property available for that purpose.

(3) Where any such dispute arises, the Collector shall refer the same with a statement thereof and his opinion thereon to the Court which made the original order for sale, and shall, pending the reference stay proceedings relating to the subject thereof. The Court shall dispose of the dispute if the matter thereof is within its jurisdiction, or transmit the same to a competent Court for disposal and the final decision shall be communicated to the Collector who shall then draw up a statement as provided in accordance with such decision.

PREPARATION OF LIST OF CREDITORS.—The assignee of a decree for money obtained against a person whose property has been under the management of the Collector under S. 72 is not entitled to be placed on the list of creditors under this paragraph. 18 A. 313. The application to be entered in the list of creditors should be made to the Collector. 18 A. 313.

APPEAL.—An order setting the claim under this paragraph is appealable. 4 M. 420 ; 10 B. 238 (*Contra* in 7 A. 565).

5. WHERE DISTRICT COURT MAY ISSUE NOTICES AND HOLD ENQUIRY.—The Collector may, instead of himself issuing the notices and holding the inquiry required by paragraphs 3 and 4 draw up a statement specifying the circumstances of the judgment-debtor and of his immoveable property so far as they are known to the Collector, or appear in the records of his office, and forward such statement to the District Court; and such court shall, thereupon issue the notices, hold the enquiry and draw up the statement required by paragraphs 3 and 4 and transmit such statement to the Collector.

6. EFFECT OF DECISION OF COURT AS TO DISPUTE.—The decision by the court of any dispute arising under paragraph 4 or paragraph 5, shall, as between the parties thereto, have the force of, and be appealable as a decree.

7. SCHEME FOR LIQUIDATION OF DECREES FOR PAYMENT OF MONEY.—(1) When the amount to be recovered and the property available have been determined as provided in paragraph 4 or paragraph 5, the Collector may,—

(a) if it appears that the amount cannot be recovered without the sale of the whole of the

property available, proceed to sell such property ; or

(b) if it appears that the amount with interest (if any) in accordance with the decree, and if not decreed with interest, at such rate as he thinks reasonable may be recovered without such sale, raise such amount and interest (notwithstanding the original order for sale) :

(i) by letting in perpetuity or for a term, on payment of a premium, the whole or any part of such property ; or

(ii) by mortgaging the whole or any part of such property ; or

(iii) by selling part of such property ; or

(iv) by letting on farm or managing by himself or another the whole or any part of such property for any term not exceeding twenty years from the date of the order of sale ; or

(v) partly by one of such modes and partly by another or others of such modes.

(2) For the purpose of managing the whole or any part of such property, the Collector may exercise all the powers of its owner.

(3) For the purposes of improving the saleable value of the property available or any part thereof, or rendering it more suitable for letting or managing or for preserving the property from sale in satisfaction of any incumbrance, the Collector may discharge the claim of any incumbrance which has become payable or compound the claim of any incumbrancer whether it has become payable or not ; and for the purpose of providing funds to effect discharge or composition may mortgage, let or sell any portion of the property which he deems sufficient. If any dispute arises as to the

amount due on any incumbrance with which the Collector proposes to deal under this clause, he may institute a suit in the proper Court either in his own name, or in the name of the judgment-debtor, to have an account taken, or he may agree to refer such dispute to the decision of two arbitrators, one to be chosen by each party or of an umpire to be named by such arbitrators.

(4) In proceeding under this paragraph the Collector shall be subject to such rules consistent with this Act, as may from time to time be made in this behalf by the Local Government.

FARM.—When the executing Court proposes to farm out agricultural land of the judgment-debtor, the terms of the farm must be decided by the Court itself. The court should follow ordinarily the advice of the Collector on the subject, but is not bound to do so. 90 I.O. 228 = 1925 L. 425.

8. RECOVERY OF BALANCE (IF ANY, AFTER LETTING OR MANAGEMENT.—When on the expiration of the letting or management under paragraph 7, the amount to be recovered has not been realised, the Collector shall notify the fact in writing to the judgment-debtor or his representative in interest that if the balance necessary to make up the said amount is not paid to the Collector within six weeks from the date of such notice, he will proceed to sell the whole or a sufficient part of the said property, and if on the expiration of the said six weeks, the said balance is not so paid, the Collector shall sell such property or part accordingly.

9. COLLECTOR TO RENDER ACCOUNTS TO COURT.—(1) The Collector shall, from time to time render to the court which made the original order for sale an account of all monies which come to his hands and of all charges incurred by him in the exercise and performance of the powers and duties conferred and imposed on him under the provisions of this schedule, and shall hold the balance at the disposal of such court.

(2) Such charges shall include all debts and liabilities from time to time due to the Government in respect of the property or any part thereof, the rent if any from time

to time due to a superior holder in respect of such property or part, and if the Collector so directs the expenses of any witnesses summoned by him.

(3) The balance shall be applied by the court—

- (a) in providing for the maintenance of such members of the judgment-debtor's family (if any) as are entitled to be maintained out of the income of the property to such amount in the case of each member as the court thinks fit; and
- (b) where the Collector has proceeded under paragraph (1) in satisfaction of the original decree in execution of which the court ordered the sale of immoveable property, or otherwise as the court may, under section 73, direct; or
- (c) where the court has proceeded under paragraph (2)—
 - (i) in keeping down the interest or incumbrances on the property;
 - (ii) when the judgment-debtor has no other sufficient means of subsistence, in providing for his subsistence to such amount as the court thinks fit; and
 - (iii) in discharging rateably the claims of the original decree-holder and any other decree-holders who have complied with the said notice, and whose claims were included in the amount ordered to be recovered.

(4) No other holder of a decree for the payment of money shall be entitled to be paid out of such property or balance until the decree-holders who have obtained such order, have been satisfied and the residue, if any, shall be paid to the judgment-debtor or such other person as the court directs.

10. SALE HOW TO BE CONDUCTED.—Where the Collector sells any property under this Schedule, he shall put it up to public auction in one or more lots as he thinks fit, and may—

- (a) fix a reasonable reserved price for each lot ;
- (b) adjourn the sale for a reasonable time whenever, for reasons to be recorded, he deems the adjournment necessary for the purpose of obtaining a fair price for the property ;
- (c) buy in the property offered for sale and resell the same by public auction or private contract as he thinks fit.

11. RESTRICTIONS AS TO ALIENATION BY JUDGMENT-DEBTOR OR HIS REPRESENTATIVE AND PROSECUTION OF REMEDIES BY DECREE-HOLDERS.—So long as the Collector can exercise or perform in respect of the judgment-debtor's immoveable property or any part thereof, any of the powers or duties conferred or imposed on him by paragraphs 1 to 10, the judgment-debtor or his representative in interest, shall be incompetent to mortgage, charge, lease or alienate such property or part except with the written permission of the Collector, nor shall any Civil Court issue any process against such property or part in execution of a decree for the payment of money.

(2) During the same period no Civil Court shall issue any process of execution either against the judgment-debtor or his property in respect of any decree for the satisfaction whereof provision has been made by the Collector under paragraph 7.

(3) The same period shall be excluded in calculating the period of limitation applicable to the execution of any decree affected by the provisions of this paragraph in respect of any remedy of which the decree-holder has been temporarily deprived.

SCOPE.—The jurisdiction of the Collector only extends to the property ordered to be sold. The attachment of leases of property already effected on such property is not void. 18 N.L.R. 131—1922 Nag. 243 ; 53 I.O. 776—16 N.L.R. 64 ; 42 I.O. 200—13 N.L.R. 130.

INCOMPETENT TO MORTGAGE, ETC.—The incompetency of the judgment-debtor to mortgage under this paragraph is absolute and the mortgage effected during the period of Collector's management is void, even if it was intended to be effective over any residue that might belong to the judgment-debtor after the end of the Collector's management. 46 C. 183 ; 36 B. 510 ; 3 N.L.R. 171 ; 13 N.L.R. 130=42 I.C. 200. Any alienation effected by a judgment-debtor is a nullity, incapable of subsequent ratification or enforcement in equity. 42 I.C. 200 ; 46 C. 183. A judgment-debtor can make a will of such property. 33 A 233. A sale effected with the permission of the Collector is not void. 66 I.C. 642=8 O.L.J. 358 ; also even if it is obtained after execution but before registration (*ibid.*)

EXTENSION OF LIMITATION.—Limitation for execution does not run so long as the property is under the Collector's management. 20 A. 383 ; 7 I.C. 860=8 M.L.T. 235 ; but not where the decree-holder is not deprived of his remedy even temporarily and no provision has been made under paragraph 7, for the satisfaction of the decree. 64 I.C. 855.

12. PROVISION WHERE PROPERTY IS IN SEVERAL DISTRICTS.—Where the property of which the sale has been ordered is situate in more districts than one, the powers and duties conferred and imposed on the Collector by paragraphs 1 to 10 shall be exercised and performed by such one of the Collectors of the said districts as the Local Government may by general rule or special order direct.

13. POWERS OF COLLECTOR TO COMPEL ATTENDANCE AND PRODUCTION.—In exercising the powers conferred on him by paragraphs 1 to 10 the Collector shall have the powers of a civil court to compel the attendance of parties and witnesses and the production of documents.

CHAPTER III.

APPLICATION FOR EXECUTION AND PARTIES TO EXECUTION.

I.—APPLICATION FOR EXECUTION.

When the holder of a decree desires to execute it he shall apply to the Court which passed the decree or to the officer (if any) appointed in this behalf, or if the decree has been sent under the provisions hereinbefore contained to another Court, then to such Court or to the proper officer thereof. (O. 21, r. 10).

An application for execution is necessary. 12 B. 400.

Discretion of the Court.—Under the former Code of 1859 a Court was not bound to grant a second application for execution unless satisfied that the failure of the first process was not attributable to the applicant's own fault. 9 W.R. 527. Under the present Code any number of applications may be made one after another.

ADDITIONAL RULE MADE BY RANGOON HIGH COURT.—O. 21, r. 10-A.—If no application is made by the decree-holder within six months of the date of the receipt of the papers, the Court shall return them to the Court which passed the decree with a certificate stating the circumstances as prescribed by S. 41.

ORAL APPLICATION.—When a decree is for the payment of money the Court may, on the oral application of the decree-holder at the time of passing of the decree, order immediate execution thereof by the arrest of the judgment-debtor, prior to the preparation of a warrant if he is within the precincts of the Court. (O. 21, r. 11 (1)).

LEGAL CHANGES.—The corresponding S. 256 of the old Code of 1882 ran as follows :—When a decree is passed for a sum of money and the amount decreed does not exceed the sum of one thousand rupees, the Court may, when passing the decree on the oral application of the decree-holder, order immediate execution thereof by the issue of a warrant directed either against the person of the judgment-debtor if he is within the local limits of the jurisdiction of the Court or against his moveable property within the same limits. Thus the points of difference between the new and the old Code are—

(1) Under the old Code it was compulsory that the amount of the decree did not exceed Rs. 1,000, in order to enable the Court to issue execution ; while under the present Code there is no limit to the amount.

(2) Under the old Code the Court could issue a warrant for the arrest of the judgment-debtor or for the attachment of his property on the oral application of the decree-holder, while under the present Code the rule is limited only to the immediate arrest before the preparation of warrant if he is within the precincts of the Court.

WRITTEN APPLICATION.—(2) Same as otherwise provided by sub-rule (3), an application for the execution of a decree shall be in writing, signed and verified by the applicant or some other person, proved to the satisfaction of the Court to be acquainted with the facts of the case and shall contain in a tabular form the following particulars, namely :—

- (a) the number of the suit ;
- (b) the names of the parties ;
- (c) the date of the decree ;
- (d) whether an appeal has been preferred from the decree

- (e) whether any and (if any) what payment or other adjustment of the matter in controversy has been made between the parties subsequent to the decree ;
- (f) whether any and (if any) what previous applications have been made for the execution of the decree, the dates of such applications and their results ;
- (g) the amount with interest (if any) due upon the decree or other relief granted thereby together with particulars of any cross-decree whether passed before or after the date of the decree sought to be executed ;
- (h) the amount of the costs, if any, awarded ;
- (i) the name of the person against whom execution of the decree is sought ; and
- (j) the mode in which the assistance of the Court is required, whether—
 - (i) by the delivery of any property specifically decreed ;
 - (ii) by the attachment and sale or by the sale without attachment of any property ;
 - (iii) by the arrest and detention in the civil prison of any person ;
 - (iv) by the appointment of a receiver ;
 - (v) otherwise as the nature of the relief granted may require.

(3) The Court to which an application is made under sub-rule (2) may require the applicant to produce a certified copy of the decree. (O. 21, r. 11).

APPLICATION FOR ATTACHMENT OF MOVEABLE PROPERTY NOT IN JUDGMENT DEBTOR'S POSSESSION.—Where an application is made for the attachment of any moveable property belonging to the judgment-debtor but not in his possession, the decree-holder shall attach to the application an inventory of the

property to be attached containing a reasonable accurate description of the same. (O. 21, r. 12).

APPLICATION FOR ATTACHMENT OF IMMOVEABLE PROPERTY TO CONTAIN CERTAIN PARTICULARS.—When an application is made for the attachment of any immoveable property, belonging to a judgment-debtor, it shall contain at the foot—

- (a) a description of such property sufficient to identify the same and in case such property can be identified by boundaries or numbers in a record of settlement or survey, a specification of such boundaries or numbers; and
- (b) a specification of the judgment-debtor's share or interest in such property to the best of the belief of the applicant and so far as he has been able to ascertain the same. (O. 21, r. 13.)

POWER TO REQUIRE CERTIFIED EXTRACTS FROM COLLECTOR'S REGISTER IN CERTAIN CASES.—Where an application is made for the attachment of any land which is registered in the office of the Collector, the Court may require the applicant to produce a certified extract from the register of such office specifying the persons registered as proprietors of or as possessing any transferable interest in the land or its revenue or as liable to pay revenue for the land and the shares of the registered proprietors, (O. 21, r. 14).

DEFECTIVE APPLICATIONS.—The requirements mentioned above applicable to a particular case are essential for a valid application for execution. Failure to comply with any of these requirements makes the application defective and the Court may reject the application or may allow the defect to be remedied then and there or within a time to be fixed by it. (See O. 21, r. 17.)

It is not every defect that would vitiate an application for execution. It is only the material defect that vitiates it, 74 I.C. 174; 14 C.W.N. 481. When the particulars omitted are minor ones and may be gathered from the copy of the decree filed with the application, the application is in accordance with law to save limitation, 31 M. 68; 75 I.O. 312.

APPLICATIONS FOR EXECUTION.—Proceedings for the assessment of means and profits are in continuation of original proceedings. 39 O. 220. An application for execution means an application under O. 21, r. 11, or one by which proceedings are commenced. 3 C. 235 ; 2 M. 1 ; when the transferee of a decree does not apply for execution but prays merely for the recognition of his rights to execute the decree the application is legally incompetent and should be rejected. 31 M. 234 ; 14 M.L.T. 51 = 21 I.C. 609. An amendment of such an application by adding a prayer for execution cannot be allowed in appeal. 21 I.C. 609 = 14 M.L.T. 51 ; 17 O. 631 F.B.

An application for an order absolute is not an execution application. 21 O. 818. An application for an order absolute is a proceeding in execution of a decree under the provisions of the O.P. Code. 35 A. 178 ; and consequently O. 21, r. 2 applies to such proceedings. 6 I.C. 1000 = 13 O.C. 137 ; 25 M. 244 ; 27 M. 40.

An application for possession under a decree for redemption is not an execution application. 4 L.B.R. 83.

An application to the Court that passed the decree, for the transfer of the decree for execution to another Court is not an application for execution of the decree. 9 I.C. 246 ; 16 O. 744 ; 20 C. 29 ; 22 O. 921 ; 20 A. 78 ; 14 I.C. 277 ; 35 B. 103 ; 34 A. 396. An application for transfer of a decree is not an application for execution. 43 C. 903 F.B. ; 8 I.C. 22 = 15 C.W.N. 661 ; 15 C.L.J. 123.

An application for arresting a judgment-debtor under O. 21, r. 32 is an application for execution. 15 I.C. 975 = 5 Bur. L.T. 116. But an incidental application for arrest of the judgment-debtor during the pendency of an execution application or after it is struck off ; is not an application for execution. 21 A. 155. An application for execution does not mean an incidental application made during the pendency of such proceedings, such as the issue of an attachment. 3 O. 235 F.B. ; 2 M. 1.

An application for sale of the attached property is not an application for execution. 17 C. 53. But is in continuation of an application for attachment. 7 I.C. 707 = 8 M.L.T. 367.

Where a decree for sale under S. 88, T.P. Act, directs accounts to be taken, an application made for taking the accounts and for declaring the amount due is an application for execution. 13 M.L.J. 212.

An application is one for execution even though it does not contain particulars as required by O. 21, r. 13. 17 C. 631 F.B.

An application for execution is not necessarily confined to the last application within the period of twelve years from the dates mentioned in S. 48, O.P. Code, 16 A. 198.

Execution proceedings are regarded as separate proceedings distinct from the proceedings in the suit itself. 16 O. 267 ; 16 B. 644.

An application for an attachment under S. 46, C.P. Code, is not an application for execution. 1926 C. 249 = 90 I.O. 527.

ADDITIONAL RULE MADE BY THE MADRAS HIGH COURT.—O. 21, r. 17 (5).—Registers in accordance with forms Nos. 19, 20 and 21 in Appendix H are prescribed for use in all civil courts having jurisdiction over the classes of cases specified therein.

ADDITIONAL RULE MADE BY THE RANGOON HIGH COURT.—For r. 13 of O. 21 the following shall be substituted.—O. 21, r. 13—(1) When application is made for execution of a decree relating to immoveable property included within the

Cadastral or Town Survey and the decree does not contain a plan of the property, or for execution of decree by the attachment and sale of such property, the application must be accompanied by a certified extract from the latest Kwin or town map, with the boundary of the land in question marked with a distinctive colour. The particulars specified in the annexed instructions, which have been issued regarding the filling up of forms of process concerning immoveable property, must also be furnished so far as they are not given in the plan. In the case of other immoveable property a plan is not required, but such of the particulars in the annexed instructions as can be given must be supplied :--(1) If the property to be sold is agricultural land which has been cadastrally surveyed, and of which survey maps exist, the area, Kwin number, latest holding number (if different kinds of holding, e.g., rice land and garden holdings are numbered in different series, the kind of holding must be stated), field number (if the property does not coincide with one complete holding), year of Kwin map from which the holding number is taken, and revenue last assessed upon the land must be given. (2) In the case of other agricultural land, the area and village tract within which it falls, distance and direction from nearest town or village and boundaries should be specified. (3) In the case of land in large towns the area, block or quarter name or number, the lot number (if there are separate series of lots, the series should be stated, and where the land forms part only of a lot, particulars regarding that part), the holding number in the latest town survey map, if any, and year of the map, the rent or revenue last assessed on the land must be given. (4) In the case of buildings situated in a large town, when the land on which such buildings stand is not affected, the name or number of the street, or if the street has neither name nor block, the quarter or block name or number, the number of the building in the street, or if it has no number, the lot number, must be given. (5) In the case of immoveable property situated in a small town or village, such of the particulars in (3) and (4) above as can be given should be given. (6) The purpose to which land or buildings are put the material and age of buildings, all incumbrances and municipal taxes should be stated. (7) The judgment-debtors' share or interest in the property should be specified.

(2) The cost of the certified extract shall be reckoned in the costs of the application.

APPLICATION FOR EXECUTION OR IN CONTINUATION OF FORMER ONE.—An application for execution is deemed to be pending until it is validly disposed of. 26 I. C. 244 = 16 M.L.T. 339 (31 M. 71 referred to). An application which is in substance an application made with the object of moving the Court in the matter of a prior application which has been postponed, suspended, or otherwise stayed by reason of some order, is an application to continue the suspended proceedings from the point where it was stayed, and may be made at any time within three years from the date when the right to apply occurs. 27 P.R. 1905 ; 17 O.C. 189 = 25 I.C. 160 ; 20 I.C. 244 ; 18 A. 482 F.B. ; 33 A. 517 ; 9 C.L.R. 297 ; 3 Pat L.J. 103 = 44 I.C. 560 ; 6 M.L.T. 333 ; 21 I. C. 923 ; 2 A.L.J. 276 ; 30 A. 499. Where an application for execution is dismissed for no fault or laches on the part of the decree-holder in the prosecution of the application, a subsequent application in all respects similar in scope and character to the former application is a continuation of that application. But when the application is dismissed on account of the default of the decree-holder in not taking any steps to proceed with it a subsequent application cannot be treated as a continuation or revival of the previous application. 53 I.C. 85 = (1920) Pat. 109. When an order for attachment was made on an execution application but the application was not disposed of in any way and another application was made for the sale of the property the latter application was one in furtherance of the former and it asked that effect be given to the application which was already pending before the Court. 31 I. C. 87. Where a former petition for execution has been dismissed for default of the decree-holder or where the properties sought

to be sold in the former petition were different from those in the subsequent petition for execution, the latter is not considered as in continuation of the former. 79 I.C. 897. A fresh application after dismissal of the previous one cannot be considered as in continuation of the previous one. 22 C.W.N. 766. When a judgment-debtor in an application to execute a decree directing demolition of his house, applied for two weeks' time to which the decree-holder consented and the Court to lighten its file by removal of one case ordered the striking off of the application for execution, and the decree-holder subsequently again made an application that steps should be taken to demolish the house it was held that the application was one to revive the former application. 26 I.C. 815. When an application was made for the execution of a decree by sale of debt, but the applicants failed to pay certain warrant fees, as the sale had been stayed by an order of the High Court and the petition was consequently struck off, the order simply amounts to an adjournment *sine die*. Even if the warrant fees had been paid the Court could not have proceeded with the application at that stage. 15 I.C. 406. An application to the superior Court to which execution proceedings are removed asking for relief is not a fresh application. 64 I.C. 493 = (1921) M.W.N. 507. When the execution proceedings are suspended through no act or default of the decree-holder the second application to carry on execution is considered as in continuation of the former. 1923 A. 471 = 71 I. C. 963 ; 65 I. C. 78 = 1922 A. 433. An application for execution may be deemed to be one to revive and carry through a pending proceeding when the latter was arrested by reason of circumstances over which the decree-holder had no control. 74 I. C. 279. When execution proceedings are suspended at the instance of the stranger having filed a suit in respect of the property which is the subject-matter of the execution proceedings, an application made just after the close of the suit is in continuation of the old one and not a new application at all. 1923 A. 600 ; 27 A. 337 P. C. An application for execution of a decree may be treated as one in continuation or revival of a previous application similar in scope and character, the continuation of which has been interrupted by the intervention of objections and claims subsequently or has been suspended by means of an injunction or later obstruction. 26 C. W. N. 339 = 68 I. C. 267 ; 37 C. 796. In order to entitle a decree-holder to claim that an application should be regarded as a continuation of the previous application two conditions must be satisfied ; first, that the previous application was dismissed for no fault or default on his part, and secondly, that the present application is similar in scope and character to the previous application. If these conditions are satisfied there is no reason why a Court should not regard the subsequent application as a continuation of the previous one. 1 Pat. L. R. 139 = 72 I. C. 862 ; 11 I. C. 48 ; 16 I.C. 541. Where the final completion of the proceedings in execution initiated by the applicant could not have been obtained within the period provided by law, by reason of causes for which the decree-holder was not responsible the further applications of the decree-holder to go on from the point where the execution proceedings had been arrested are in continuation of the previous application. 1926 A. 331 = 94 I. C. 613. An application which is in substance ever made with the object of moving the Court in the matters of a former application which has been postponed, suspended or otherwise stayed by reason of some order is an application to continue the suspended proceedings from the point when it was stayed. 17 O. C. 169 ; 17 A. 425 ; 70 P. R. 1904 ; 6 A. 23 ; 5 A. 459 ; 23 A. 13 ; 8 A. 845 ; 5 B. 229 ; 5 A. 273 ; 20 I. C. 244 ; 16 I. C. 541. See 11 O.C. 57. The theory of continuation applies only when the previous application has been interrupted by reason of circumstances over which the decree-holder had no control. 21 I. C. 923. Where during and while the execution application was pending, the judgment-debtor made an application in insolvency and at his instance execution was stayed under S. 50 of the Provincial Insolvency Act, and when the bar was removed the decree-holder applied for execution ; held that the subsequent application was in continuation of the previous one. 16 I. C. 541. When a mortgagee-decree-holder entitled to proceed against any of the mortgaged properties, in execution of the decree

against one of such properties encounters temporary obstruction not owing to a fault of his own but owing to a dishonest intervention of the judgment-debtor, and removes that obstruction, he is entitled by a subsequent revival of the execution proceedings which temporarily abated owing to the interruption to continue his proceedings against that property whether or not there be other property hypothecated, and it is unnecessary to enquire whether such property is available. 38 I. C. 411=3 O.L.J. 706. Pending an appeal against a decree for possession and mesne profits, sureties were given and execution stayed, more than three years from the passing of the appellate decree; the surety was sought to be made liable, *held* that the application against him was time-barred as the application for assessing mesne profits did not keep alive the decree against him. 47 B. 778. A judgment-debtor applied for execution against the decree-holder transferee and certain other persons who had got the money deposited in Court under the decree and was successful. Then the purchaser applied and got the order set aside. Then the judgment-debtor made a second application for restitution against the decree-holder for loss suffered by him on account of the sale. It was held that the second application was a continuation of the first and so not barred by time. 19 A.L.J. 549=63 I.C. 184. Successive applications to enforce an attachment are considered in continuation of previous ones. 17 P.R. 1910. An application for attachment is not one in continuation of an application for arrest. 13 I.C. 929=9 A. L.J. 17. An application for attachment is not one in continuation of an application to summon the judgment-debtor and to order him to pay the decretal amount. 112 P.L.R. 1902.

Application for sale.—An application for execution by sale of property which was already attached in pursuance of a prior application, not legally disposed of, is one in continuation of the prior proceedings. 12 M.L.J. 24; 17 C. 53; 8 M. L.T. 367. Where the later application is made for sale of property not included in the previous application, the subsequent application must be treated as a fresh application. 12 M.L.J. 24; 7 C. 556. An application for sale of the mortgaged properties made after 12 years of the date of the decree, but within 12 years of an application for attachment of the same is time barred, as the latter application under a mortgage decree is futile. 28 M. 224; 24 C. 473.

It is well established that an execution application can be considered as a continuation of the previous one only when it is similar in scope and character to the prior application. So when the former application asked the court in form and substance to sell the properties of the judgment-debtor other than those which were comprised in the mortgage, and the second application, in form and substance, asked the court to realise the money from the judgment-debtor by his arrest and detention in the civil prison, it is impossible to consider the second application as one in continuation of the former. 71 I. C. 333=4 Pat. L.T. 295; 1 Pat. L.J. 214. An application for execution cannot be regarded as an application in continuance of an application for transfer of a decree from one court to another. In order that an application may be in continuation of another application it is necessary that the two applications must be of the same nature, and an application for transfer being of an entirely different nature from that for the execution of a decree does not suspend the operation of S. 48, C. P. Code. 34 A. 396. Where a former petition for execution has been dismissed for default of the decree-holder, or where the properties sought to be sold in the former petition were different from those in the subsequent petition for execution, the latter is not considered in continuation of the former. 79 I. C. 897. Successive applications for the arrest of a judgment-debtor are in continuation under the same application. 21 A. 155; 6 P. L. R. 1910; 6 M. 365. When the decree-holder applied for execution within three years of the decree but died pending the application leaving two sons one of whom was a major and the other a minor, and the major son applied to execute the decree after recognising him as the

legal representative of the deceased decree-holder, and the major son died and the application was struck off on the report of the decree-holder's vakil that he had no instructions, another application by the minor was considered as a fresh application for execution as the original application was validly disposed off when it was struck off; and if it was presented after three years from the date of striking off, it was barred by limitation. 41 A. 435. When an application for execution is defective on account of no sufficient list of properties and a further list is given it must be taken to be given in the application of execution that is pending. 22 C.W.N. 540. If the first application is *ab initio* a bad application, a subsequent application cannot be an application in continuation. 68 I.C. 636=1922 P. 310. When the decree-holder applied for execution on the last day of limitation and subsequently discovered that the judgment-debtor had died before the date of the application, and without unreasonable delay got his legal representative substituted in his place and proceeded with execution against the latter it was considered as a proceeding in continuation of the proceedings started on the last day of limitation. 6 I.C. 971=14 C.W.N. 971.

Presentation after amendment under O. 21, r. 17.—Where an application for execution is returned for amendment and re-presented after being amended the period of limitation runs from first application. 26 M. 101. See O. 21, r. 17. An application to amend a previous application, though not in the form prescribed by O. 21, r. 11, but which, when read with the previous application, supplies all the information required by that rule, should be treated as a fresh application. 53 I. C. 111. An application which is unverified and put in on the last date of limitation and amended afterwards by proper verification is time barred as being fresh application after amendment. 26 M. 101. An application for arrest may after amendment and addition of a prayer for attachment of the property of the judgment-debtor be considered a fresh application made at the date of amendment. 15 M.L.J. 243. An application for substitution of certain properties for those already mentioned in the application for execution is a fresh application. 7 C. 556.

Where an application is pending in a Court, another application for rateable distribution to the Court by which assets are held is one in continuation of the previous one. (1931) M.W.N. 507=64 I.C. 493.

Striking off execution proceedings.—When an order on an application was “immovables attached, strike off petition, but the attachment will continue”; subsequently, the application for sale of the attached property was dismissed for non-payment of batta; a subsequent application is not one in continuation of the previous one. 13 I.C. 160. There is no provision in the Code for striking off execution proceedings. 10 C. 418; 13 C.L.R. 176; 5 A. 243; 10 B. 108; 31 M. 261; 21 A. 155. The proper order to be made is one under O. 21, r. 57.

An application for execution and substitution under O. 21, r. 16, made during the pendency of execution proceedings is not an application for fresh execution but an application for the continuation of the pending case. 78 I.C. 766=5 Pat. L.T. 451.

THE APPLICATION SHALL BE SIGNED AND VERIFIED.—The application may be verified by a person holding a general power of attorney from the decree-holder. 26 A. 154. When there are a number of decree-holders some of whom are not acquainted with the facts of the case, all that the law requires is, that the application should be verified by some person proved to the satisfaction of the Court to be acquainted with the facts of the case. 74 I.C. 174=2 Pat. 809. It is not necessary that an application for execution made by a person other than the decree-holder under O. 21, r. 11 (2) should be verified after an application for permission has been made; nor is it necessary

that the verification should be made in the presence of the court. All that is necessary is that the court should be satisfied that the person who signed the verified application is acquainted with the facts of the case. 28 C.W.N. 687=80 I.C. 913. An application for execution of a decree presented by a pleader without being signed or verified by the decree-holder is not one in accordance with law and it does not even when amended by leave of the court, save limitation to run. 26 M. 101. The fact that the decree-holder's power-of-attorney was not filed with the application was not such a grave defect as could not be cured by an amendment so as to save limitation. 32 P.W.R. 1919=49 I.C. 982. An application for execution presented by an agent without the power-of-attorney is defective; but the defect can be cured by an amendment and subsequent filing of the power-of-attorney under O. 21, r. 17 (2). 118 P.R. 1912; 105 P.R. 1882. An application for execution filed on behalf of the decree-holder by a pleader retained in the slip is a valid application. 91 I.C. 211; 86 I.C. 359=1925 Pat. 869.

NUMBER OF THE SUIT.—Omission to put the right number of the suit does not constitute a material defect. An application with such a defect is in accordance with law. 25 C. 594.

THE NAMES OF THE PARTIES.—When one of two joint decree-holders applied for execution of the decree, but omitted to mention the name of the other decree-holder in the column for names of the parties as required by cl. (b) of r. 11, by such an omission he was not guilty under S. 193, I.P.C. A.W.N. (1887) 223. When a person is named as a guardian *ad litem* in an execution application and a notice is issued to him under O. 21, r. 22, it may be presumed that the court appointed him as the guardian. 5 L.L.J. 434. When the legal representative is not brought on the record, the sale in execution in his absence is bad. 7 M.L.T. 270. An order in execution proceedings against a dead person is a nullity. 161 P.W.R. 1911. The mere fact that the application is made by one of the decree-holders does not make it against law. 90 I.C. 847; 12 O.L.J. 109. An omission to state the names of all parties interested in the decree does not invalidate execution proceedings. 1926 C. 811=30 C.W.N. 562.

DATE OF THE DECREE.—An error or omission in regard to date of the decree does not vitiate an application for execution. 25 C. 594; 1 A. 212; A.W.N. (1893) 112; 23 A. 162; 42 I.C. 100; 1 I.C. 240; 48 P.R. 1898.

ADJUSTMENT.—The decree-holder is bound to state in his application for execution any adjustment of the decree between the parties. 2 M. 216; 10 B. 288; 1926 Nag. 164=89 I.C. 1009. The fact that no mention was made of such particulars as whether any money had been realised or any settlement arrived at or whether any previous execution had been sought is not such grave defect as could not be cured by an amendment so as to save limitation. 32 P.W.R. 1919=49 I.C. 982. The decree-holder is bound to state in his application, any adjustment between the parties after decree, whether it has or has not been certified previously to the court. 10 B. 288; 63 I.C. 535=6 Pat. L.J. 337. An intentional omission to mention in an execution application an adjustment, vitiates the application. 78 I.C. 291. An intentional omission to make an adjustment in the application for execution amounts to an offence under S. 193, I.P.C. 10 B. 288.

INTEREST DUE UPON THE DECREE.—Mode of calculation—Calculate the interest on the decretal amount up to the date of each payment made (if any), credit the payment of this interest, carry the surplus towards the credit of the principal and strike a fresh balance and so on. 55 P.R. 1892.

Continuation of interest.—A judgment-debtor who wants to be released from the claim of his creditor must pay the money covered by the decree into court to the credit of the decree-holder unconditionally. If he chooses to make a protest, the creditor is not bound to take the money out subject to any liability which may arise as the consequence of such protest. 2 C.L.R. 183.

Future interest.—When a decree is silent as to future interest, it cannot be recovered in execution proceedings but may be by a separate suit. 3 O. 602 P.C.

COSTS IN STERLING.—The costs awarded in sterling by His Majesty in Council must be converted into Indian Currency at the rate of exchange for the time being fixed by the Secretary of State at the time when the order of His Majesty in Council was made. 25 C. 283 ; 8 A. 650 ; 23 C. 357.

MENTION OF PREVIOUS APPLICATIONS.—Omission to make mention of a previous application is such a material defect as to render the subsequent application not in accordance with law. 65 I.C. 14=15 S.L.R. 156 ; where there have been two previous applications for execution, and in the third application the date of disposal of the first application is stated but not of the second, though the numbers of execution cases with regard to both the previous applications are stated, the defect is not material so as to vitiate the application for execution. 71 I.C. 1054.

AMOUNT OF THE DECREE, ETC.—An application for execution which does not show the amount of the decree or interest due under it is not in accordance with law under O. 21, r. 17 (2). 65 I.C. 120 ; 22 I.C. 337=18 C.L.J. 538 ; A.W.N. (1890) 93. Taking out execution for a larger amount than is due does not vitiate the sale held thereunder. 14 I.C. 839=15 C.L.J. 422.

CROSS-DECREE.—Omission to mention the existence of the cross-decree is not material where the decree obtained by the decree-holder is in his personal capacity and the decree obtained by the judgment-debtor is in his capacity as an executor. 71 I.C. 1054.

COPY OF THE DECREE.—Sub-rule (3) of r. (11) is new. Under the old Codes it was held that an application for execution need not be accompanied by a copy of the decree or the original decree. 9 W.R. 362 ; 16 W.R. 25 ; 11 W.R. 271 ; 11 C.L.J. 243 ; 10 W.R. 144 ; 11 W.R. 28. The court is entitled to require the applicant to produce a certified copy of the decree and on non-compliance to reject the application. 40 A. 209 ; 47 I.C. 993. A person who desires to obtain execution of a decree which has been affirmed by the Privy Council must produce a certified copy of the order passed by His Majesty in Council. 5 C. 329.

INVENTORY OF PROPERTY.—When a decree-holder fails to annex to the application for execution of his decree an inventory of the property to be attached with a reasonable accurate description of the same as required by O. 21, r. 12 the application is not in accordance with law and cannot save limitation when it is dismissed for non-compliance with an order for an amendment. 37 A. 527 ; A.W.N. (1892) 47 ; A.W.N. (1894) 54 ; A.W.N. (1892) 70. Rule 72 requires only a reasonably accurate description of the property sold. When the interest secured by a bond is sold in court auction and there is no mistake as to what was sold the fact that the date of the bond was incorrectly given would not affect the validity of the title acquired at such sale. 9 M.L.T. 419=9 I.C. 729=(1911) M.W.N. 133. Omission to verify the inventory of the property sought to be attached in the manner prescribed is an irregularity only and does not vitiate the application. 28 A. 244 ; 22 A. 55. The creditor is bound to specify the interest of his judgment-debtor in the property to be attached to the best of his belief.

12 B. 678 ; 1 B. 601. Where an application for attachment is made and it is not known what kind of property it is which is to be attached, the absence of an inventory will not prevent such an application being considered in accordance with law. A.W.N. (1892) 55.

DESCRIPTION OF THE PROPERTY.—When the descriptions of the property are different, it is the duty of the court to ascertain by reference to the record or other evidence to which description the decree was intended to apply and that description which is more certain will prevail. 17 O.O. 256. The fact that an application for execution did not give a sufficient description of the property of the judgment-debtor as required by r. 12, though it stated that a specification of the property sought to be attached existed in a previous execution case, is a defect because it is not a strict compliance with the provisions of the rule, but it does not follow that it was not an application at all. 12 C. 161. Where in an application for execution, the property sought to be attached has not been described as required by r. 13, it is still open to the court to require amendment in this respect, before any immoveable property is attached and the decree-holder may be called upon to furnish necessary particulars. 65 P.L.R. 1915=34 I.C. 955. Where certain properties were entered in the application against which the court could not proceed, the decree-holder could be allowed to amend the application by putting in a further list of properties to be attached. 22 C.W.N. 540=44 I.C. 553. When property intended to be attached is wrongly described in material particulars both in the application for attachment and in the order for attachment it cannot be said that there is a valid attachment. 3 A. 698. Omission to state encumbrances of the decree-holder in the property to be attached in his application for execution has the effect of destroying the lien of the decree-holder on the property. 5 C.W.N. 497. An application with which an encumbrance certificate is not filed and which does not specify the assessment on the land sought to be brought to sale is not defective and is in accordance with law. 40 M. 949. The description should be sufficient to identify the property. 12 W.R. 488 ; 18 W.R. 411. O. 21, r. 14 does not apply in the case of execution of a decree passed for the sale of mortgaged property as no attachment is necessary in such cases. 5 O.L.J. 414=47 I.C. 639. Where no such description is given as required by rr. 13 and 14 the application is not in accordance with law. A.W.N. (1892) 3 ; A.W.N. (1890) 22. The application may be amended so as to conform to the provisions of those rules. 65 P.L.R. 1916=34 I.C. 955. It is the duty of the decree-holder to specify the interest of the judgment-debtor in the property to be attached. 1 B. 601 ; 47 C. 446 ; 14 A. 190.

MODE OF ASSISTANCE.—The rule makes no mention of a temporary alienation of land, the reason being probably that the court of execution when refusing to order the sale of the property is expected to direct instead a temporary alienation thereof without any specific prayer to that effect. 2 L.L.J. 398=58 I.C. 603. The application shall specify the mode in which the assistance of the court is required. Where it did not specify it was rejected. 19 B. 34 ; 11 I.C. 696 ; 7 N.W.P. 79. An application not complying with ol. (j) must be dismissed unless the defect is remedied (*ibid*). The decree-holder is not limited to the relief asked for in his application, but he may be granted other reliefs which the law allows him. 23 C. 306. Where in a suit under S. 92, C.P. Code, an application by the decree-holder prayed that the defendants be ordered to conform to the decree and if they failed steps be taken in accordance with law, it was held that it did not contain any specific mode of relief. 19 B. 34. An application must state the relief which the law enables the court to grant. 1 N.L.R. 61. If the application seeks relief which the court has no power to grant, it is not valid. 12 A. 64 ; 27 A. 619. If the application asks for relief granted by the decree, the mere fact that the court would have refused such relief, does not render the application one not in accordance with law. 37 B. 42 ; 17 I.C. 210=

14 Bom. L.R. 861. An application to arrest the judgment-debtor in contravention of the provisions of S. 58, C.P. Code, is not one in accordance with law. 12 A. 64. An application to bring the mortgaged property to sale in continuation of S. 39, T.P. Act, is not one in accordance with law. 12 A. 64. An application for attachment of the property believed by the decree-holder to belong to the judgment-debtor is in accordance with law, though it turns out on enquiry that the property did not belong to the judgment-debtor. 6 P.R. 1895. Where a decree grants different kinds of reliefs to be obtained by processes of different kinds, there is no valid objection to separate applications by partial execution of the decree. 7 N.W.P. 95; 18 O. 515; 4 I.C. 408 = 14 O.W.N. 465; 26 C. 888; 12 B. 98. See 9 I.C. 240. There is no provision in law which prevents a court from entertaining concurrent applications for execution of the same decree. 71 I.C. 741.

AMENDMENT.—The law clearly casts upon the court the duty to ascertain whether the application complies with the requirements of the rules, and, if it does not, to do one of the two things, either to reject the application or to allow it to be amended there and then or within a fixed time. It is the duty of the court to give the applicant an opportunity of putting in a proper application and the decree-holder should not be made to suffer for the omission on the part of the Court. 46 P.W.R. 1920 = 55 I.C. 16; 10 O. 541; 69 I.C. 200 = 1922 Pat. 409. An amendment cannot be allowed, under r. 17, of an application which when complete would, even if dating from its original presentation, be barred by limitation. 112 P.L.R. 1902; 9 M.L.T. 347. As a general rule amendments ought not to be allowed when they would prejudice the rights of the other parties as existing at the date of such amendment. An application for execution may be amended by allowing addition of a prayer for attachment. 9 I.C. 760 = 9 M.L.T. 347. It is open to the Court to allow to amend the application for execution already filed by the addition of other properties to the list of properties sought to be attached and O. 21, r. 17 does not bar any such amendment. 4 Pat. L.T. 99 = 71 I.C. 741. O. 21, r. 17, which empowers the Court to allow a defect in the requirements of rr. 11 to 14 to be amended does not include r. 15 in it and hence where the application for execution of a joint decree by one of the decree-holders is not made for the benefit of them all, it cannot be allowed to be amended. (1919) Pat. 349 = 59 I.C. 803. The Court has power to allow amendment although the decree may be barred by limitation at the time of amendment. 12 O. 161. Where a decree is affirmed in appeal, it is only the decree by the court of appeal that can be executed and an application for execution of the former decree must not be rejected but only returned for amendment under O. 21, r. 17. A.W.N. (1885) 304. An overstatement of any amount due in the execution application is no ground for amendment of the application. He may be allowed execution only to the extent to which he is entitled. A.W.N. (1895) 18. When an application is registered under r. 17, no amendment is possible thereafter. 74 I.C. 144.

Limitation for amendment.—When an order for the amendment of an execution application within a fixed period was disobeyed and the application was not rejected, leave to make the amendment granted upon a subsequent petition is not *ultra vires*. 8 O. 479. An application presented within 12 years of the date of the decree, even when the amendment thereof is made more than 12 years after it, is within time and S. 48 does not bar the application. 74 I.C. 144 = 2 Pat. 747; 76 I.C. 750 = 45 M.L.J. 651. But see 49 M.L.J. 699. An application must be deemed to have been represented on the date of original presentation. 37 I.C. 78. On an application, made before the period of limitation expired, under O. 21, r. 17, C.P. Code, to file a list of immoveable properties which the decree-holder had not filed till then, the court made the order "permitted". When however the list was put in, the period of limitation had already run, *held* that the application for execution was barred. 18 C.L.J. 588 = 22 I.C. 337. See also 1922 P. 409 = 1 Pat. 149.

Court acting on defective application.—When a notice is issued under O. 21, r. 22, O.P. Code, its legal effect as affording a new starting point for a fresh period of limitation is not in any way affected, by the fact that the application with reference to which the court acted may have been irregular in form or defective in some of the particulars required by O. 21, r. 11. 11 O.P.L.R. 157; 1 A. 676.

AMENDMENT OR REJECTION.—Under r. 17 the court is not expressly bound to reject an application not amended in accordance with its orders, as it was under S. 245 of the Old Code of 1882. But the effect of the rule is that the Court is bound to reject it unless it is duly amended within the time or the extended time allowed by the Court, or that the decree-holder can show that it does not require amendment. 63 I.C. 971=17 N.L.R. 179. The Court is not bound to order amendment. It may reject the application and such order is not illegal. 1926 M. 260=92 I.C. 260.

Effect of rejection.—An application that is rejected *in limine* has no more been presented than one that the applicant has taken with him into Court, but has omitted to offer to the judge or the proper officer. 63 I.C. 971=17 N.L.R. 179. An application for execution rejected under O. 21, r. 17 as not being in accordance with law will not operate to save limitation under Art. 182 of the Limitation Act, 21 C.W. N. 835=31 I.C. 916.

IN ACCORDANCE WITH LAW.—O. 21, r. 17 is not intended to affect the construction put upon the words "applying in accordance with law" occurring in Art. 182 of the Limitation Act, by judicial decisions in dealing with formal defects in execution applications. The rule is an enabling provision which allows certain defective applications subsequently amended to be deemed applications in accordance with law with effect from the date of their first presentation. 31 M.L.J. 561=35 I.C. 876.

EFFECT OF RETURNING FOR AMENDMENT.—There is no provision of law that where an application conforms with the prescribed requirements and is returned for some other reason it shall not be deemed to have been presented in accordance with law. 74 I.C. 174; 23 C. 217. Such an application even if nothing is done by way of amendment is substantially in accordance with law. 6 M. 250; 16 M. 142; 12 C. 161; 12 C.L.R. 279; *contra* was held in 23 C. 217, which is doubtful under the present Code. 14 C.W.N. 481; 44 I.C. 220; 26 I.C. 413. The presentation of an application for execution however nearly correct, which is rejected by the Court as incorrect, whether an opportunity is offered to amend it or not, is not in accordance with law to save limitation under Art. 182, Limitation Act. 63 I.C. 971=17 N.L.R. 179; 37 I.C. 916=21 C.W.N. 835.

EFFECT OF AMENDMENT.—An application amended under r. 17 is deemed to be presented on the date when it was first presented. 45 M.L.J. 651; 52 I.C. 765; 76 I.C. 750=35 M.L.T. 125; 95 I.C. 876=31 M.L.J. 561; A.W.N. (1893) 112; 1 O.C. 541. But where an application for execution being unverified and otherwise defective is amended within the time allowed by the Court but after limitation for the execution has run out, it is barred. 23 C. 217; 15 C.W.N. 71; 44 I.C. 220; 116 P.R. 1907; 22 I.C. 337=18 C.L.J. 537; 44 I.C. 553; 38 I.C. 136. When, in an application for execution the decree-holder asked for the attachment of immovable property, and did not give the description of the same as required by O. 21, r. 13 and only promised to file it later, but no order was passed under rule 17 (1) allowing the defect to be remedied, the application can date only from the time when the requirements of r. 13 are complied with. 49 M.L.J. 699. When an application is presented by an agent and it is objected that the agent is not duly authorised and the agent thereupon files a power of attorney the application should be treated as having been filed on the date on which the power of attorney is filed on the principle contained in O. 21, r. 17 (2). 118 P.R. 1912.

APPEAL.—An appeal lay under the corresponding S. 245 of the Old Code. Under the present Code it is not an appealable order. An appeal from an order under this rule lies if it falls under S. 47.

II.—WHO CAN APPLY FOR EXECUTION.

THE HOLDER OF THE DECREE may apply for execution (O. 21, r. 10). The decree-holder who appears on the face of the decree is entitled to execute it unless it be shown that some other person has taken the decree-holder's place. 18 C. 639 ; 11 W.R. 271. An application not made by the decree-holder at the time on the record is not a proper application to execute the decree. 24 W.R. 10.

Decree-holder means any person in whose favour a decree has been passed or an order capable of execution has been made. (S. 2 (3), C. P. Code.)

A decree-holder within the meaning of the C.P. Code is the person whose name appears on the record as the person in whose favour the decree was made, or some person whom the Court has recognised, by order as the decree-holder for the original plaintiff or his representative. 2 M. 216. When a party to the suit whether plaintiff or defendant has been granted any relief he is the decree-holder to that extent and is entitled to execute the same. 17 C.P.L.R. 178. A decree-holder cannot first sell a decree and then proceed in execution of it. 3 W.R. 90. In such a case the transferee has a right to execute (*ibid*). A stranger who was no party to a suit but who got certain rights under a compromise in the decree has no right to apply for execution, though he is entitled to a separate suit on the basis of the compromise. 37 I.O. 133. A decree-holder includes any person to whom a decree has been transferred. 26 C. 250 ; 27 C. 670 ; 25 M. 539 ; 24 W.R. 245 ; A.W.N. (1893) 262 ; 5 I.O. 120.

A benamidar decree-holder cannot apply to execute the decree and an application for execution by him, cannot be treated as a step-in-aid of execution so as to save a subsequent application by the real decree-holder from the bar of Art. 182 of the Limitation Act. 25 I.O. 555 ; 16 C. 355 ; 9 C. 633 ; See *contra* in 10 O.C. 263 ; 37 A. 414. When a beneficial owner of a decree applies to be made a party to a pending execution application presented by the nominal decree-holder on the ground that his rights were not properly safeguarded, the Court is bound to implead him as a party. 44 M.L.J. 123=72 I.O. 874 (26 C. 250 ; 44 M. 919, referred to.) An application by the decree-holder's benamidar, who is recognised as a transferee, is valid. 20 C. 388 ; 11 C.L.J. 83 ; 19 W.R. 255 ; 24 W.R. 10.

An application by the agent.—An agent holding a general power of attorney under two joint decree-holders may apply even when one of them was dead at the date of the application, the fact not being known to the agent ; and the application is in accordance with law. 13 C.L.R. 18. When an objection is raised on an application for execution that the agent is not duly authorised, and he files his general power of attorney, the Court should not dismiss the application but treat it as having been filed on the date on which the power of attorney is filed. 118 P.R. 1912 ; 32 P.W.R. 1919=49 I.C. 982.

When in the first Court the Government obtained their costs, and the opposite party appealed without making the Government a party, and got the decree of the first Court reversed it was held that the Government not having been made a party to the appeal were entitled to recover their costs in the first Court. 1 B.L.R. S.N. 28 (a).

When the transferee has not been recognised by the Court, the decree-holder on record is entitled to apply for execution. 34 I.C. 791.

Where a decree (in the P.C.) has been passed in favour of a number of persons jointly, the application by one or more of them under O. 45, r. 15 would be sufficient to entitle all of them to apply for execution in the Court below. 2 Pat. L.J. 496 = 40 I.C. 508.

Pre-emptor.—Where during the pendency of a suit for possession of immovable property, the plaintiff sells the property to A, A can execute the decree passed, and a pre-emptor of the sale to A, as he stands in his shoes, can execute the decree. 8 O.C. 186.

Representative of the decree-holder.—When a decree-holder has applied for rateable distribution before the realisation of assets his representative has a right to be entitled to the same and hence also can object under O. 21, r. 90, C.P. Code. 3 M.L.J. 249.

Partition decree.—In a decree for partition any plaintiff or defendant may apply for execution. 23 P.R. 1905; 67 I.C. 417 = 24 Bom. L.R. 496. When in a decree for partition, the plaintiff wants to drop the proceedings, it is open to the defendant to insist on the proceedings being carried out by partition. 24 Bom. L.R. 496 = 67 I.C. 417.

Decree for specific performance.—A decree for specific performance is capable of being executed by the defendants as well as by the plaintiffs. If this were not so, it would follow that a plaintiff who has obtained a decree for specific performance refuses to take the sale-deed and pay the consideration money, the defendant is left with no remedy whatever; while owing to the decree being passed against him he would still be debarred in any way from dealing with the suit property. 24 Bom. L.R. 496 = 67 I.C. 417.

Application through a pleader.—Applications for execution of a decree are proceedings in the suit and the vakalatnama shall be considered in force until all proceedings in the suit are ended so far as regards the client, and a pleader has authority to present the execution application without filing a fresh vakalatnama. 20 B. 198; 26 B. 109. An execution application presented to the Court by a pleader duly appointed for the purpose by an agent of the decree-holders who was apparently authorised by them to execute vakalatnamas to Vakils, to sign execution petitions and to conduct all necessary proceedings is one validly presented on behalf of the decree-holders. (1921) M.W.N. 552 P.C. An application for execution by the pleader of the decree-holder, duly authorised is in accordance with law even though the vakalatnama authorising him to file a petition is undated or omits to mention the name of the pleader. 26 M. 197; 33 O. 399; 41 I.C. 685; 26 A. 46; 19 A.L.J. 183. An application made by a pleader after his client's death is invalid. 7 A. 564. An application for execution presented by a Mooktear on behalf of all the decree-holders, one of whom only signed it, the names of the rest having been added thereto by the Mooktear, is one on behalf of all the creditors to save the limitation. 4 C. 605; 24 W.R. 233.

If the decree is passed jointly in favour of more persons than one, any one of the decree-holders may apply for his share in the decree, if the interests of several decree-holders are determined by the decree. 9 C. 482 P.C. There is no express provision in the C.P. Code as to the course to be pursued when several persons having a right in the decree want to execute it. 17 I.C. 323. An application for execution of a portion of a decree may be allowed where the decree is complex and grants reliefs of different kinds to be obtained by different processes. 7 N.W.P. 9.

Where a decree is passed jointly in favour of more persons than one, all can ordinarily apply jointly for execution of the decree. In such a case the Court has also power to appoint a receiver to execute the decree, and to pay over the proceeds to the various parties interested. 17 I.C. 323.

APPLICATION FOR EXECUTION BY JOINT DECREE-HOLDER.—

(1) Where a decree has been passed jointly in favour of more persons than one any one or more of such persons may, unless the decree imposes any condition to the contrary, apply for the execution of the whole decree for the benefit of them all, or where any of them has died, for the benefit of the survivors and the legal representatives of the deceased,

(2) Where the Court sees sufficient cause for allowing the decree to be executed on an application made under this rule it shall make such order as it deems necessary for protecting the interest of the persons who have not joined in the application. (O. 21, r. 15).

A DECREE PASSED JOINTLY IN FAVOUR OF MORE PERSONS THAN ONE.—It is implied that all the decree-holders have a joint interest in the subject matter of the decree. If the interests of the several decree-holders are determined by the decree, their interests are not joint in the decree. 17 I.C. 323; 9 C. 482 P.O.; 61 P.R. 1910. The rule provides only for cases where the decree itself makes the interests of several decree-holders joint. It does not apply to transferees of portions of decrees. 15 P.R. 1917. The view taken by Madras High Court is contrary. The interest of any decree-holder in the decree may be transferred. 19 M. 306; 26 C. 250. An assignee of some of the decree-holders may apply for execution alone when the others refused to join him in execution and such an application is in accordance with law. 5 I.C. 120.

UNLESS THE DECREE IMPOSES ANY CONDITION TO THE CONTRARY.—

Where by the terms of the decree execution has been made dependent on all the decree-holders joining in the application, this rule does not apply. 6 A. 69. These words are new in the present Code and give effect to the above decision.

EXECUTION OF THE WHOLE DECREE.—An application by one of the decree-holders in a joint decree, for execution of the decree so far as his share in the decree is concerned is defective, 18 M. 464; 15 B. 242; 5 A. 27; 5 A. 35; 4 A. 72; 19 W.R. 302; 4 N.W.P. 90; 13 W.R. 244; 7 W.R. 535; 11 W.R. 241; 17 W.R. 19; 23 W.R. 342; 7 W.R. 10; 22 W.R. 354; 6 W.R. Mis. 65; 6 W.R. Mis. 76; 2 N.W.P. 413; 24 W.R. 11; 12 W.R. 373. He may apply for execution of the whole decree. 29 I.C. 181; 7 W.R. 10. Where a decree has been satisfied in part the application for execution cannot be made for the whole decree. In such cases the whole decree means the whole of the part that has remained unsatisfied at the date of the application, in fact or by operation of law. 12 W.R. 370.

FOR THE BENEFIT OF THEM ALL.—Under O. 21, r. 15 a petition for execution of the whole decree is permissible by one of the decree-holders if the execution is for the benefit of all the decree-holders. When a petition by one of the joint decree-holders does not state that the execution was for the benefit of all the decree-holders and

it is not even mentioned in the column prescribed for stating the names of the parties nor anywhere else in the petition, it is clear that the execution is taken out by one of the decree-holders only in respect of the entire decree. (1919) Pat. 349—53 I.C. 803 ; 2 U.B.R. (1897—1901) 247 ; 45 A. 401 ; 61 P.R. 1910. Purchase by one of the decree-holders (mortgagee) must be deemed to have been made for the benefit of all the decree-holders and the decree-holders other than the purchaser are entitled to recover from the latter their proportionate shares of the property purchased. 78 I.C. 814 (A). Where one of the decree-holders makes an application for execution for the benefit of all, the Court need not enquire as to who the other decree-holders are before making an order for execution, 89 I.C. 811—1925 Pat. 591.

AMENDMENT OF APPLICATION.—An application for amendment of an execution application for the share of the decree-holder may be allowed so as to fulfil the requirements of O. 21, r. 15. 7 W.R. 535. But it cannot be amended in appeal. 11 W.R. 241 ; 17 W.R. 19 ; 23 W.R. 342.

ANY ONE OR MORE OF SUCH PERSONS.—Persons claiming under the decree-holders are such persons. 26 C. 250 ; 49 I.C. 141. If in the course of execution any person claims to be brought on the record as the heir of the deceased, the Court should enquire into the matter and dispose of it according to law. 43 I.C. 1008. In the case of a joint mortgage if any one of the decree-holders dies, his legal representatives are entitled to apply for an order absolute without joining the other decree-holders and the Court might pass orders safeguarding the interests of the others. 34 A. 72. If there are more than one decree-holders any one of them may apply for execution of the whole decree. 29 I.C. 181.

DISCRETIONARY POWER OF THE COURT.—This rule allows a very wide discretion to the Court which has authority to make such adjustments of the rights of the decree-holders *inter se* as it may think equitable and proper. 45 A. 401. The Court has a discretion to issue out process for execution in cases falling under O. 21, r. 15, and where the Court did not exercise such discretion, but on the contrary, the Court did not seem to be aware of the discretion, the case may be remanded. 10 M.L.T. 396 ; 36 M. 357. The Court may grant or refuse execution on the application of one of the decree-holders under this rule. 7 O.L.R. 537 ; 21 W.R. 31 ; 22 W.R. 77 ; U.B.R. (1897—1901) Vol. 2, 247. It is not obligatory upon the Court to give notice to the other decree-holders or to the judgment-debtor before making an order for execution. 38 C. 306 ; 1926 C. 811—30 C.W.N. 562. And if the other decree-holders subsequently appear and give their consent to the execution of the decree, their interests are properly safeguarded. 1926 C. 811—30 C.W.N. 562.

AN ORDER PROTECTING THE INTERESTS OF THE OTHER DECREE-HOLDERS.—When execution is taken out and an adjustment certified by a managing member, no security is ordinarily necessary except in cases of collusion. 25 M.L.J. 442—21 I.C. 177 ; 1 B.L.R. A.C. 28 ; 16 W.R. 29 ; 11 O.C. 286. The Court should make arrangements for protecting the interests of all the decree-holders when allowing execution, on the application of one. 15 W.R. 159 ; 22 W.R. 204 ; 23 W.R. 282 ; 2 Agra 183. It is not open to the judgment-debtor to say that sufficient steps have not been taken to safeguard the interests of the other decree-holders, when they themselves have made no complaint whatever, 54 I.C. 924 ; 8 M.L.J. 91.

NOTICE.—No notice is necessary to be given to the judgment-debtor especially when he has deliberately disobeyed the orders of the Court. 33 C. 306. No order to the prejudice of a party can be passed without giving him an opportunity of being heard. 4 Pat. L.T. 207—1923 P. 180.

PAYMENT OUT OF COURT TO ONE OF THE DECREE-HOLDERS.—It may be dealt with under two heads. First, where one of the decree-holders has got satisfaction of his share or a part of his share out of Court.—In such a case, the other decree-holders cannot get execution of the whole decree but only for the part remaining after deducting the part satisfied. 9 O. 831; 3 O.L.R. 618; 1 N.L.R. 124 whether the first mentioned decree holder certified his payment or admitted it on the application being made does not make any difference. 15 M. 343. But if he does not admit payment, the execution must issue for the whole decree (*ibid.*)

Secondly, where the Judgment-debtor pays the whole amount out of Court to one of the decree-holders, or to more than one but not to all.—The ordinary rule is that a joint decree-holder is not bound by the act of another who has compromised or received payment from and given discharge to the judgment-debtor beyond the extent of his own share in the decree. 60 P.L.R. 1915=27 I.C. 603; 26 A. 318; 26 A. 334; 28 A. 252; 4 C.L.R. 70; 36 P.R. 1906; 25 M. 431; 1 Agra Mis. Ap. 16; 2 B. L.R. 43; 15 M. 343; 9 O. 831. In such cases the other decree-holders are entitled to execute the decree to the extent of their share jointly (*ibid.*); A.W.N. (1884) 55; A.W.N. (1886) 125; 11 W.R. 262. Besides, the other decree-holders can sue the decree holder who has received payment of the whole decretal amount, for their share in the decree 29 M. 183. The above rule does not apply in the case of a managing member of a joint Hindu family. 35 C. 561; 60 P.L.R. 1915; 21 I.C. 177=25 M.L.J. 442. But not when the managing member is on the worst possible terms with the other members and the judgment-debtor's conduct has been throughout dishonest and fraudulent and he is colluding with the former in order to defraud the other members of the family. 50 P.L.R. 1915=27 I.C. 603. A payment to one of several joint decree-holders will not be in satisfaction of the decree even in part unless the payee is an agent of the others entitled in law to receive the whole amount on their behalf, or the distinct shares of each joint decree-holder are determined and known. 82 I.C. 568. A payment of the decree to two out of the three joint decree-holders cannot be treated as a satisfaction of the decree even in part unless it is admitted by the third decree-holder or proved that the several decree-holders have a separate or definite shares in the decree. 35 I.C. 157=31 M.L.J. 93; 25 M. 431; 15 M. 343.

APPEAL.—See Chapter IX "Questions relating to Execution."

APPLICATION FOR EXECUTION BY TRANSFEREE.—Where a decree, or if a decree has been passed jointly in favour of two or more persons, the interest of any decree-holder in the decree, is transferred by assignment in writing or by operation of law, the transferee may apply for execution of the decree to the Court which passed it, and the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder, provided that where the decree or such interest as aforesaid has been transferred by assignment, notice of such application shall be given to the transferor and the judgment-debtor and the decree shall not be executed until the Court has heard their objections (if any) to its execution :

Provided also that where a decree for the payment of money against two or more persons has been transferred to one of them it shall not be executed against the others. (O. 21, r. 16).

OBJECT AND SCOPE.—The effect of this rule is to put a party to whom a decree is transferred, into the position of the original decree-holder and entitle him to have the decree executed as if an application were made by the original decree-holder. 7 W.R. 205 ; 14 O.P.L.R. 35. O 21 r. 16 does not say that the decree can no longer be executed by the original decree-holder, but only empowers the transferee to take out execution if he sees fit. 16 O.C. 70=18 I.C. 97 ; when the transferee of the decree has not been recognised by the Court, the decree-holder on record is entitled to execute the decree in spite of the transfer. 3 L.W. 521=34 I.C. 791. The rule does not apply to cases where the applicant for execution is not a transferee of the decree either by assignment in writing or by operation of law. It does not apply to cases where the right to an equitable interest in the decree is in question. 2 C. 327 P.C.

APPLICABILITY.—Companies Act.—As in the case of decrees, so in the case of orders of payment under S. 180 of the Companies Act, the person to apply for the enforcement of the decree or order is the person in whose favour the decree or order has been made. An assignee or transferee cannot make such an application unless and until his name has been substituted for that of the persons in whose favour the decree or order has been passed or made Ss. 200 and 201 of the Companies Act must be held to be subject to the special provisions of O. 21, r. 16 of the C.P. Code and therefore a transferee of an order under S. 180 of the Companies Act must in the first instance apply to the Court which made the order. 92 P.R. 1818.

The provisions of O. 21, r. 16 are applicable to an award filed in Court and the assignee of such an award can apply for execution of the same after the recognition of his rights. 27 C.W.N. 666.

When a decree against an insolvent company is transferred pending the insolvency proceedings it is the duty of the transferee to first go to the executing Court and get himself substituted for the original decree-holder before he applies to prove his claim before the official liquidator. 41 A. 432.

TRANSFeree UNDER AN ASSIGNMENT IN WRITING.—The transferee of a decree under an assignment in writing is a transferee under this rule and he can apply for execution. A transferee under an oral assignment is not such a transferee and he cannot apply for execution. 15 B. 307 ; 9 B. 379 ; 4 O.W.N. 474 ; 16 I.C. 807 ; 10 M.L.T. 532=13 I.C. 78 ; (1911) 2 M.W.N. 559 ; 43 C. 990 P.C. When a decree obtained by a member of a joint Hindu family was allotted at a family partition to another member, the latter cannot be considered as a transferee, as there is no transfer either by operation of law or by assignment. 16 I.C. 807. It is the assignment in writing and not the sanction of the Court that completes the transfer. 2 M.L.T. 93 ; 16 A. 483 ; 11 C. 57 ; 26 C. 250 ; 9 A. 46 ; 33 M. 62 ; 11 C. 353 ; 1 I.C. 353=5 M.L.T. 260. After an assignment by the decree-holder of an *ex parte* decree the judgment-debtor applied to have the *ex parte* decree set aside and made the assignee also a party to the application and the *ex parte* decree was set aside. After trial a decree was passed in favour of the assignee decree-holder, the original plaintiff also having asked the Court to do so. It was held that the decree was passed according to law. 24 C.W.N. 1001 P.C.=58 I.C. 21. A transferee of a decree *pendente lite* is entitled to execute the decree passed in appeal therefrom. 35 M.L.J. 294=44 I.C. 849. A transfer of the property or interest awarded by a decree does not make the assignee the transferee of the decree so as to entitle him to execute the decree. A.W.N. (1907) 280 ; 17 I.C. 323 ;

7 A. 107; 30 A. 28; 28 M. 64; 2 L.L.J. 1; 35 A. 204; 17 M.L.J. 391
 30 I.C. 831; 17 I.C. 512; 1922 A. 98=66 I.C. 878; 3 Pat. L.T. 625=1922 P. 562,
 (contra in 1 N.L.R. 49); 51 O. 703. An assignment of a certain property with all its rents
 and future rents does not operate as an assignment of a decree for arrears of rent
 obtained by the assignor. 28 O.W.N. 626=80 I.C. 881. Where A obtained a decree for
 an injunction against B restraining him from obstructing A in the execution of his
 rights of way over B's land and afterwards A sold the land to C, the latter could not
 execute the decree obtained by A, as the decree had not been transferred to C, but only
 the land with the right of way. C's proper remedy is to sue B for an injunction again if B
 obstructs C. 32 B. 181. A decree that may be passed in a pending suit cannot be
 transferred so as to entitle the transferee to execute such decree. 2 M.L.T. 197=17
 M.L.J. 391; 30 I.C. 831; 51 O. 701; 3 Pat. L.T. 625. A decree-holder may
 transfer a part of his claim under the decree and the transferee can execute
 the decree. 17 O. 341; 33 M. 80; 2 M.L.T. 197; 38 O. 13; 1926 A. 346=24
 A.L.J. 430. A part of maintenance decree may be transferred. 33 M. 80; 38 O.
 13; 44 M. 919. Such a transferee is like a joint decree-holder, and can under
 O. 21, r. 15 protect his rights either by executing the decree himself or by joining or
 intervening in the execution by his transferor. 44 M. 919. But a part of the decree
 which is indivisible cannot be transferred. 28 M. 64; 30 A. 28; when a decree for
 dower is passed with costs in favour of A, a transfer of the decree with respect to costs in
 favour of B does not entitle B to get the decree executed. 35 A. 204. The rights under a
 decree cannot be severed so that the remedy against the person may remain in one
 and pass to another the alternative remedy against the property. 2 M. 119. The interest
 of any decree-holder in the decree may be transferred. 19 M. 306. 26 C. 250; 44 M.
 919. In the Punjab it is held that a small portion of any one individual decree-holder's
 rights cannot be transferred and that O. 21, r. 16 applies only when the whole of a
 decree has been transferred or when the whole interest of any decree-holder but of
 several has been transferred. 15 P.R. 1917. See also 65 I.C. 679=1922 A. 101; 17
 O. 341; 24 W.R. 245; 35 A. 204. A devised and bequeathed all his property to B in
 trust for C with a direction that it should be assigned to C as soon as he came of age.
 During the pendency of a suit by B against D for the recovery of a sum of money
 advanced as trustee, B assigned to C, "all moveable property, debts, claims and things
 in action whatsoever vested in him." A decree was afterwards passed in favour of B
 against D. Held that the whole interest in the decree was transferred to C, either by
 operation of law or by assignment in writing and C could execute the decree. 11 B. 506.

The absence of consideration, for the assignment of a decree is immaterial and
 will not deprive the assignee of his right to execute the decree, provided the assign-
 ment is not a sham transaction. (1918) M.W.N. 256; 507. Absence or inadequacy
 of consideration is a matter between the assignor and the assignee only. 20 I.C.
 685=18 O.W.N. 450. When there is an agreement to assign, the intended assignee
 is not entitled to apply for execution. 43 O. 990 P.O.; 17 M.L.J. 391; 49 I.C. 141;
 26 I.C. 244=2 L.W. 109. Consideration for assignment of a foreign judgment is
 governed by the law of the place where the judgment was made. 23 M. 449. In
 execution of a decree, the mortgaged properties were sold, together with all arrears
 of rent. Before the sale the mortgagees had instituted rent suits against the tenants
 holding *jamas* under the properties hypotheated, and obtained decrees on the very
 day the purchasers at the execution sale obtained their conveyance from the officer of
 the court. The purchasers were held to be transferees and could apply for execution of
 the decrees. 57 I.C. 874. As between the assignor and the assignee the assignment
 though effected in fraud of creditors is good and binding. The proceeds of execution
 will be subject in the assignee's hand upon trust for the creditors whose rights were
 sought to be defeated by the assignment. The attaching creditors are entitled to an
 adjudication on the assignee's rights to execute. 17 I.C. 328=13 M.L.T. 227.

Assignee of a decree for rent under Bengal Tenancy Act.—If after the expiration of an *ijara* lease the *ijaradar* assigns to the superior landlord a decree he had obtained for rent, the transferee cannot apply for the execution of the decree as S. 148 (h) of the Bengal Tenancy Act is a bar to such an application. 1 O.W.N. 694, followed in 10 C.W.N. 44.

An assignee of a decree for maintenance has the right to execute the decree against the judgment-debtor in the same manner as the original decree-holder and to realise by execution arrears of maintenance as they fall due from time to time. 38 C. 16.

Transfer of a decree for injunction.—Where a person obtains a decree for injunction in respect of an easement right and subsequently transfers the property to which the right of easement is appurtenant to a third person, so long as there is no transfer of the decree itself the decree-holder is entitled to execute it. 31 I.C. 542=29 M.L.J. 693; 7 A. 101.

A transfer of a decree by an un-recognised transferee is seldom objected to in practice and is recognised by the Courts as passing a good title. 33 I.C. 558 (M); 24 I.C. 706; 9 A. 46; 73 I.C. 951. (But see 37 P.R. 1893). A transfer by the widow of the deceased decree-holder without obtaining a succession certificate under S. 4 of the Succession Certificate Act of 1889 is not valid. 37 P.R. 1893.

Benami transferee.—When A purchases a decree in favour of B, against C, in the name of D, A is the real transferee and D is the benamidar or ostensible transferee. The benamidar transferee is entitled to take out execution. 37 A. 414; 10 L.B.R. 280; 62 I.C. 299; 43 I.C. 801=(1918) M.W.N. 226; 40 M. 296; 78 I.C. 372; 48 M. 553. According to the Calcutta High Court, the benamidar is not entitled to take out execution. But if he has succeeded in taking out execution (in cases where it is not brought to the notice of the Court that the transferee is the benamidar), the application for execution can be continued by the real transferee, or will save a subsequent application of the real transferee from being barred by limitation. 20 C. 388, 395; 16 C. 355; 2 C. 327 P.O.; 20 W.R. 305; 5 O.L.R. 253. See also 6 M.L.J. 31; 4 B.L.R. 40. (But see *contra* in 9 C. 633 and 16 C. 355). Whenever the real transferee wants to further conduct the execution issued out at the instance of the benamidar, the proceedings in execution up to that date are binding upon him. 21 M. 388. An assignee of a decree who is a benamidar of the real decree-holder assignee is entitled to take out execution in his own name, at least in cases when no title to immoveable property is in question. (1918) M.W.N. 226=43 I.C. 801. When a decree has been transferred to one person as benamidar for the real transferee it is the latter that has admittedly the right to apply under O. 21, r. 16. 21 M. 388. A person alleging himself to be the real assignee of a decree does not constitute himself a party to the suit by merely applying for execution. 2 C. 371. An assignment in favour of the wife of a pleader for the judgment-debtors is a good transfer and cannot be considered as benami, for the pleader as the pleader cannot be a party to the execution case. 22 O.W.N. 491=44 I.C. 13. Where the transferee is the benamidar for the judgment-debtor, the execution should be refused. 54 I.C. 944; 40 M. 296; 19 N.L.R. 151; 28 I.C. 906. A benamidar assignee of a decree for mesne profits can apply to the Court for the ascertainment of mesne profits. 18 C.W.N. 450=20 I.C. 685.

When the decree-holder is a Bank and it is voluntarily wound up during the pendency of execution proceedings, and amalgamated with another Bank under an agreement of transfer, there is a valid transfer. 88 I.C. 1016=1925 O. 417. An assignment during the pendency of a suit, of the rights of the plaintiff in whose favour the decree is subsequently passed is not an assignment under O. 21, r. 16, so as to enable the assignee to execute the decree. 1926 B. 406. A vendee of the property made

redeemable by a decree on payment of a certain sum of money within a certain time does not thereby become an assignee of the whole decree by mere payment into the Court the amount required for redemption. 11 P.W.R. 1920.

REGISTRATION OF THE DEED OF TRANSFER.—A deed of assignment of a mortgage decree is not compulsorily registrable even though the consideration for the assignment is more than Rs. 100, the decree not being immoveable property. 23 C. 450; 1 B. 267; 9 A. 108. See 13 A. 89.

TRANSFEREES BY OPERATION OF LAW.—The holder of a certificate of administration under S. 7, Reg. VIII of 1827 is a transferee by operation of law. 11 B. 368.

The cestue que trust to whom the trustee has assigned the claim in respect of which a decree is subsequently passed in favour of the trustee is such a transferee (on obtaining majority). 11 B. 506.

The insolvent to whom on annulment of insolvency, the Official Assignee by order of Court makes over the estate. 4 C.W.N. 785. When a trust has been declared invalid, the owners of the properties are the transferees by operation of law. 2 Pat. L.T. 731=2 Pat. L.R. 27. No assignment by the ex-trustee is necessary in such a case (*ibid*).

A minor succeeding to the estate of his father which up to the date when it fell into his hands had been in the possession of an executrix of the father's will and who as such executrix had obtained a decree is the transferee of such a decree. 16 C. 347; 21 M. 353; 13 C.W.N. 533.

The purchaser at an auction sale of a mortgage decree is the transferee. 13 I.C. 324=22 M.L.J. 161. An assignee of a decree which was obtained by a member of a joint Hindu family and which was assigned at a family partition can be considered an assignee by operation of law. 16 I.C. 837. A purchaser of the judgment-debtor's decree at an auction sale is a transferee by operation of law. 13 I.C. 324=22 M.L.J. 161; 16 C. 355; 16 M. 20; 29 M. 318. An Official Assignee, in the case of an insolvent decree-holder is his transferee by operation of law. An attaching creditor is not a transferee for purposes of execution under O. 21, r. 16. He is a representative in interest of the decree-holder whose rights he attaches. 13 M.L.J. 227=17 I.C. 323.

When a trust has failed, the properties and their accessories including decrees must be held to have been reverted to the original owner who was competent to execute the decrees without any express assignment from the trustee. 4 Pat. L.T. 731=80 I.C. 652. The minor son of a testator whose probate of a will is revoked succeeds to the estate which was in the possession of the executrix under the will and there is a transfer by operation of law. 16 C. 347; 21 M. 353; 1 N.L.R. 49.

The expression "operation of law" must be understood to mean the operation of law as administered in Indian Courts. 11 B. 506, 512. The legal representative of a deceased decree-holder is the transferee by operation of law. 31 M. 77; 9 Bom. L.R. 409; 71 I.C. 409=1923 N. 195. A son of a Hindu father who has obtained a decree for partition against his father for a fractional share of whatever may be allotted to the father under another decree for partition in a suit brought by the father against the co-parceners, is such a transferee. 13 M. 347. A person by being a decree-holder of the decree-holder does not become a transferee by operation of law. 1926 P. 320. There is nothing in O. 21, r. 16, prohibiting persons, other than those mentioned in it from being treated as transferee decree-holders. 1926 M. 371=92 I.C. 1021.

RESTRICTED RIGHTS OF TRANSFEREES OF DECREES.—A transferee of a decree shall apply for execution.—If an assignee of a decree does not make an application for execution of the decree, it is not the duty of the court *suo moto* to determine the question of assignment and make the assignee a party to the decree. The absence of an application under O. 21, r. 16 is a mere irregularity and does not prevent the court from deciding the validity of the transfer when the assignee wants to execute the decree. 4 Lah. L.J. 259=1922 Lah. 396. An application to a court by a transferee of a decree to be substituted in place of the original plaintiff and for recognition of the transfer will not be entertained except on an application for execution. 14 I.C. 704 ; 14 M.L.J. 393 ; 2 M.L.T. 339 ; 7 W.R. 393 ; 21 I.C. 609. An application by an assignee of a decree for transmission of the decree and for a notice to issue under O. 21, r. 16 can only be treated as an application for execution. 29 C. 235. See 26 M. 258. A transferee decree-holder may put in a petition to enter up satisfaction of a whole or a part of a decree without putting in an application for execution. There is no necessity according to the Code for the assignee getting any previous order recognising his assignment before doing so. 12 M.L.T. 592=17 I.C. 617. If there is an assignment pending execution proceedings, nothing in the code debars the Court from recognising the transferee as the person to go on with the execution. The omission of the transferee, if it is an omission to make a fresh application for execution, is merely an error of procedure. 26 C. 250 ; 10 C.L.J. 398 ; 8 Bur. L.T. 216 ; 4 Lah. L.J. 259 ; 36 C. 543. An application under O. 21, r. 16 made during the pendency of execution proceedings is not an application for fresh execution but an application for the continuation of the pending execution case. 5 P.L.T. 451=78 I.C. 766 ; 62 I.C. 30=2 Pat. L.T. 619. When the transferee of a decree does not apply for execution, viz., for arrest or attachment of property of the judgment-debtor, but prays merely for the recognition of his right to execute the decree, the application is legally incompetent and should be rejected. 31 M. 234 ; 14 M.L.T. 51=21 I.C. 609. An amendment of such an application by adding a prayer for execution cannot be allowed in appeal. 21 I.C. 609 ; 17 C. 631 F.B. When property of the judgment-debtor is already under attachment, it is not necessary for the assignee to apply for a fresh attachment. 16 A. 133 ; 12 B. L. R. 411 ; 23 A. 114. The assignee or transferee of the decree cannot continue any proceedings for the execution of the decree previously commenced, nor can he institute fresh proceedings for the execution of the decree unless he makes an application under O. 21, r. 16. 47 B. 643.

Application to the court that passed the decree.—When a decree of a sub-court is transferred to another district for execution and subsequently the decree is assigned by the decree-holder, the assignee must apply for execution of the decree assigned to the court that passed the decree and not to the District Court to which it was transferred for execution. The latter court has no jurisdiction to pass any orders in execution upon an application of the transferee. 25 A. 443. An application may be made to the court to which the jurisdiction of the court which passed the decree has been transferred. 12 C.W.N. 839. A transferee decree-holder may apply to the court which passed the decree to send it for execution to another court. 26 M. 258 ; An uncertified adjustment cannot be considered by the court as a ground for refusing to recognise the transfer. 51 I.C. 922=10 L.W. 179. The existence of a cross-claim against the assignor is no ground for refusing execution by the transferee. 15 C. 446. When there is equity in favour of the judgment-debtor and the cross-decree can be legally set off the amount may be deducted from the decree against the judgment-debtor in execution. 8 W.R. 202 ; 15 W. R. 127. If the amount of the cross-decree is larger the transfer may not be recognised. 22 W.R. 235. Transfer of a decree subsequent to its attachment is a bar to its execution by the assignee. 1 I.C. 353=5 M.L.T. 260 ; 13 I.C. 659=11 M.L.T. 144 ; 17 I.C. 323=13 M.L.T. 227. A transferee shall apply for execution

to the Court which passed the decree even though the decree has been transferred for execution to another court. 2 A. 283 ; 9 B.H.C. 46 ; 37 M. 231 ; 22 C. 558 ; 28 M. 466 F.B. ; 21 B. 456 ; 35 C. 974 ; 156 P.L.R. 1905 ; 5 C. 736 ; 26 Bom. L.R. 491=80 I.C. 422 ; 47 B. 643 ; 25 A. 443 ; 14 W.R. 65. The Court executing a transferred decree has no jurisdiction to make an order for execution on an application by a transferee ; such an order is illegal and liable to be set aside on appeal. 27 C. 488 ; 25 A. 443 ; 14 W.R. 65 ; 9 B.H.C. 46 ; 2 A. 283 ; 11 O.C. 112 ; 92 P.R. 1918 ; 17 M.L.J. 400 ; 71 I.C. 409 ; 47 B. 643 ; 80 I.C. 422. The tahsildar as revenue officer has certain powers in the execution of a decree by ejectment, but he cannot execute such a decree in favour of any one but the person named in it. It is left for the civil court who transferred the decree for execution to the revenue officer. 71 I.C. 409=1923 Nag. 195. An application by a transferee of a decree obtained against a company which has since gone into liquidation for substitution of his name as decree-holder under S. 47 (3) of the C.P. Code must in spite of the provisions of S. 171 of the Companies Act be made to the executing court and not to the winding up court. 41 A. 432. Where an order of the Privy Council was transmitted under O. 45, r. 15, C.P. Code, by the High Court to the District Court as the court which passed the first decree, the latter court had jurisdiction to entertain an application made by an assignee of the decree under O. 21, r. 16 to recognise the assignment and to allow him to execute the decree, 38 M. 832. An omission to make an application to the court that passed the decree is only an irregularity not affecting the merits. 22 C. 458.

Discretion of the Court.—Under the Code the court had a discretion to grant or refuse the execution on such an application if that court thought fit. 15 B. 307 ; 9 B. 179 ; 20 C. 388 ; 15 W.R. 283 ; 13 W.R. 224 ; 28 M. 357 ; 8 M. 455 ; 27 C. 488 ; 15 C. 446 ; 4 B.L.R. App. 40 ; 19 W.R. 255 ; 2 C.P.L.R. 45 ; 15 W.R. 283. It had power to stay execution or to dismiss the application. 28 M. 357. Under the present Code the words " if the court thinks fit " are omitted from the old section and it seems that when the conditions required are satisfied, a transferee of a decree is entitled to execution as of right. 1 L.W. 206=23 I.C. 951. An uncertified adjustment cannot be considered by a court as a ground for refusing to recognise the transfer of a decree and when the transferee decree-holder applies for execution the court has no discretion to refuse execution on the ground that there has been an adjustment though not certified to the court. 54 I.C. 922=10 L.W. 179 ; 14 M. 169.

Notice of the application to the transferrer and the judgment-debtor.—Notice of the application must be given to the transferrer and the judgment-debtor, and the decree shall not be executed until the court has heard their objections (if any) to the execution (proviso to r. 16). If no notice is given the court has no power to execute. 9 A. 46 ; 118 P.L.R. 1917=39 I.C. 952 ; 5 Pat. L.J. 390=57 I.C. 250 ; 6 I.C. 262=11 C.L.J. 354 ; 22 W.R. 235 ; 24 B. 504 ; 56 I.C. 461. When the judgment-debtor is dead the notice shall be given to his legal representative. 11 B. 727. The notice must be issued by the court that passed the decree and not by the court to which the decree is sent for execution. 29 C. 235. When the judgment-debtor does not object to the first application for execution of a decree on the ground of non-service of notice on the transferrer, he cannot take such objection when a subsequent application for execution is made. 5 Pat. L.J. 639=57 I.C. 707. The provisions of O. 21, r. 16 are of a mandatory nature and a non-compliance with them renders all proceedings in execution void. 2 Lah. 230 ; 36 B. 58 ; 9 A. 46 ; 78 I.C. 766=5 P.L.T. 451 ; 56 I.C. 461 ; notice, not of the assignment, but of the execution proceedings taken by the assignee must be given to the judgment-debtor and the transferrer. 2 Pat. L.T. 619=62 I.C. 30. When a decree-holder transfers his interest the decree cannot be executed until notice has been served upon the assignor in accordance with r. 16. The fact that a notice

purporting to be under S. 158-B (2) of the B.T. Act, has been shown to the assignor will not dispense with the necessity of complying with this rule. When a party had a plenty of time to comply with the provisions of law contained in the rule, but has omitted to do so, he has no absolute right to insist upon an adjournment in order to allow him to rectify his own omission. 57 I.C. 250 = (1921) Pat 1. When it is shown that the judgment-debtor had notice of the application for execution by being present when the petition for substitution was being considered by the court, the mere fact that a written notice was not served on him will not nullify the proceedings. 5 Pat. L.T. 451 = 78 I.C. 766. It cannot be supposed that the legislature intended the transferee's rights under a decree to be annulled by the death of the judgment-debtor or the transferrer and the consequent impossibility of serving him with notice. 11 B. 727. Rule 16 requires notice of the application for execution and not of the assignment to be given to the transferrer and the judgment-debtor. Therefore when the assignee applies during the pendency of the execution case to continue it, he does not apply for fresh execution and no notice under the rule is necessary. 5 Pat. L.T. 451 = 78 I.C. 766. The object of the notice is to enable the transferrer and the judgment-debtor to raise such objections as regards the assignment as may be available to them. 4 Pat. 129 = 86 I.C. 564 = 1925 Pat. 449. No notice can be served unless the representatives are brought on the record. 30 M. 541. The notice must be issued by the Court which passed the decree. 29 C. 235. A judgment-debtor who fails in an execution proceeding to object to the execution on the ground that notice of the transfer of the decree and of the execution proceedings has not been served on the transferrer, cannot object in any subsequent proceeding. 57 I.C. 737 = 5 Pat. L.J. 639.

INQUIRY INTO THE OBJECTION.—On the objection of the judgment-debtor the Court should enquire into the objection, otherwise the order is liable to be set aside. 23 I.C. 951. An attachment made before hearing the objections of the judgment-debtor is unlawful. 13 Bom. L.R. 973 = 36 B. 58. As between the assignor and the assignee the assignment though effected in fraud of creditors is good and binding. The proceeds of execution will be subject in the assignee's hands upon trust for the creditors whose rights were sought to be defeated by the assignment. The attaching creditors are entitled to an adjudication on the assignee's rights to execute. 17 I.C. 323 = 13 M.L.T. 227. The assignment in writing may be produced after the execution petition is already put in and the defect in the application is cured thereby. 13 Bom. L.R. 22. A person to whom a decree is transferred must prove his title to execute it if his title be disputed. The burden lies on him. 6 W.R. Mis. 126. It is not open to an Official Receiver to object to the execution of a decree by a person to whom it has been transferred under O. 21, r. 16 on the ground that the transfer was void under S. 37 of the Provincial Insolvency Act. 38 I.C. 231. It is competent to the transferrer before execution of the decree to raise the question that the execution proceedings were fraudulent and had been brought about by collusion between the decree-holder and the judgment-debtors (who had parted with them) and that the decree had been satisfied before the sale in execution. 21 I.O. 938 = 18 C.L.J. 264. When a transferrer of a decree who was only a banamidar for one of the judgment-debtors by whom the decretal amount had in fact been paid, applied for execution of the decree a plea by the other judgment-debtors that the transferees had no title to execute the decree is not barred by O. 21, r. 2 (3). 40 M. 296. Where on an application by the transferee to have his name substituted as decree-holder, no objection is taken by the judgment-debtor as to the validity of the transfer, the judgment-debtor will be precluded from questioning the validity of the transfer on an application by the transferee for execution of the decree. 38 A. 289 ; 23 I.C. 286 = 12 A.L.J. 206 ; 60 I.C. 722 = 22 A.L.J. 928. Similarly if no objection is taken as to the legality of service of notice on the transferrer under this rule he cannot take much objection in subsequent proceedings. 5 Pat. L.J. 639.

A DECREE FOR THE PAYMENT OF MONEY.—When a decree for the payment of money against two or more persons has been transferred to one of them it shall not be executed against the others. (Proviso to r. 16).

28 I.O. 906 ; 20 I.C. 569.

The expression signifies a personal decree for the payment of money against two or more persons jointly. Where a mortgage decree calls upon all the judgment-debtors, consisting of mortgagors and transferees of equity of redemption without obstruction to pay up the decretal amount and directs that upon their failure to do so the mortgaged property will be sold, the decree is not a personal decree. 16 O.W.N. 132=12 I.C. 70. The second proviso refers to a decree for money personally due by two or more persons. It does not refer to a case in which nothing was due from the assignor of the mortgage decree personally and he was made a defendant in a suit upon the mortgage only by reason of his having become the owner of the mortgaged property in execution of a money decree against the mortgagor. 11 C. 393. The expression is not restricted to personal decree for money against two or more defendants. 19 N.L.R. 151. A mortgage decree is not a decree for the payment of money. 1926 M. 623=93 I.C. 58. For other cases of money decrees, see under other chapters.

When the whole decree has been transferred to one of the judgment-debtors, the decree is wholly extinguished and the transferee cannot execute the decree against other judgment-debtors. The remedy open to the transferee is by way of a suit against the other judgment-debtors for contribution as if the decree had been satisfied by him. The rule bars the remedy by way of execution and not the other remedy, 32 B. 195, 197 ; 9 W.R. 230 ; 5 A. 27 ; 20 I.C. 569=18 O.W.N. 113 ; 28 I.C. 906 ; 2 I.C. 625.

When an interest of one of the decree-holders is transferred to one of the judgment-debtors the decree is extinguished to the extent of the interest so transferred. 25 W.R. 343 ; 5 A. 27 ; 61 P.R. 1910.

When a decree is passed against two or more persons but their liability is not joint, any judgment-debtor who is a transferee of the whole decree may get the part which is only against the other judgment-debtor, executed. 32 B. 195. When a decree is passed against two or more persons, but in a representative capacity against any of them, the rule does not affect the interests of such representative as transferee, as the rule applies in cases of only personal decrees. A representative of the judgment-debtor against whom a decree is passed and who gets the whole decree transferred to himself may execute the remaining portion recoverable from other judgment-debtors or their estate. 91 B. 308. But see 43 M.L.J. 761.

IN THE CASE OF DECREES OTHER THAN THOSE FOR PAYMENT OF MONEY.—The transferee judgment-debtor has the same rights as a stranger transferee in the decree and can execute it against the other judgment-debtors to the extent of the liability which is not satisfied. Of course he cannot execute for his own share of liability under the decree. 27 C.L.J. 110=41 I.C. 269 ; 7 W.R. 136. In the case of mortgage decree the principle mentioned above prescribed for money decrees has been applied in. 10 A. 570. The rule does not apply to a mortgage decree for sale which in essence is not a money decree. 47 M.L.J. 434=82 I.C. 948 ; 41 I.C. 269 ; 16 O.W.N. 132 ; 11 C. 393 ; 1 I.C. 525 ; 47 M. 948. A benamidar for one of the judgment-debtors in a money decree cannot execute the decree to the extent mentioned above. 46 M. 206 ; 54 I.C. 944 ; 19 N.L.R. 151=78 I.C. 372 ; 2 U.P.L.R. 42=54 I.C. 944 ; 21 M. 888 ;

4 L.W. 534 = 35 I.C. 624 ; 43 M.L.J. 761 = 16 L.W. 758. O. 21, r. 2 is no bar to the recognition of an adjustment of the decree in cases like these. 43 M.L.J. 761 = 16 L.W. 758 ; 40 M. 296 ; 4 O.W.N. 534.

RIGHT OF SUIT.—A transferee of a decree whose application for execution is rejected on the ground that the transfer is not valid has a right to bring a regular suit for a declaration as to the validity of the transfer. Such a suit is not barred by S. 47. 26 M. 264 ; 20 A. 539 ; 15 O. 187 ; 12 O. 105 ; 28 M. 64 ; 28 M. 357. A joint judgment-debtor obtaining the transfer of the decree for payment of money in his name cannot execute it. His only remedy is to sue his co-debtors for contribution. 44 M. 334 ; 6 N.W.P. 1. No suit will lie to establish a right to execution when an order dismissing an application under this rule has been allowed to become final under S. 47. 16 M.L.J. 27 ; 28 A. 613.

EQUITIES IN FAVOUR OF THE JUDGMENT-DEBTOR.—Every transferee of a decree shall hold the same subject to the equities (if any) which the judgment-debtor might have enforced against the original decree-holder. (S. 49, C. P. Code.)

CASES.—A obtained a decree against B and having got payment out of Court, satisfaction was not recorded. C got the decree subsequently transferred to him with knowledge of the satisfaction out of Court. C had no right against B either in execution proceedings or by way of a regular suit. 42 M. 338. If the judgment-debtor has the right of equity to set off his cross-decree against the transferrer under O. 21, r. 18 ; the transferee will hold the decree subject to that right or equity. 1 B.L.R. F.B. 23. A obtains against B a final decree for sale on a mortgage. Afterwards C purchased a part of the mortgaged property at an execution sale in execution of a simple money-decree against B. Then C purchased from A the mortgage-decree and then proceeded to execute it seeking to realise the whole amount by sale of the residue of the mortgaged property remaining in the hands of B. *Held* that in consequence of the vesting of the mortgagee's interest in a person who has acquired a part of the equity of redemption the decree was extinguished *pro tanto* and could be executed only for the balance of the amount left against the residue of the mortgaged property. 42 A. 544. A decree being assigned, the judgment-debtor deposited the money in Court and, in execution of a decree which the judgment-debtor had against the assignor, attached the same in Court ; *held* that he was entitled to do so. 19 N.L.R. 161. A transferee stands in the same position for executing the decree as the original decree-holder. 11 B. 727 ; 7 W.R. 105 ; 22 W.R. 235. But see 13 I.C. 659 ; 18 I.C. 97 ; 17 I.C. 323. A obtained a decree against B for a certain amount. B then sues A for a sum of money. Pending B's suit C obtains a transfer with notice of the suit. A decree is then passed for B in his suit against A. C applies for execution against B for the whole decree against him. He is not entitled to execute for more than the difference between the two decrees, as the transfer was taken with notice of B's suit. 16 O. 619 ; 26 M. 428. A transferee merely occupies the position of the transferrer relative to the judgment-debtors and takes the decree subject to the same rights of equity and set off as those under which it was held by the transferrer. 21 W.R. 141 ; Oudh S.C. 131 ; 7 I.C. 55 ; 12 I.C. 205 ; 19 W.R. 85 ; 18 W.R. 442 ; 10 W.R. 32, F.B. ; 16 C. 619 ; 6 O.L.R. 498 ; 27 A. 450. Assignment takes effect only on notice to the judgment-debtor as against him and is subject to all equities arising prior to the date of such notice. 26 M. 428. A transferee of money-decree obtained by a mortgagee is prohibited from selling the mortgaged property in execution of such decree, as the transferee by virtue of S. 49 and O. 21, r. 16

takes the decree subject to the conditions provided in S. 99, T.P. Act, 31 M. 33; 9 Bom. L.R. 728. The assignee takes the decree subject to the equities or limitations attached to it. 10 M.L.J. 211. A subsequent transferee for value is not bound by uncertified payments made to the transferrer before the date of transfer, 33 I.O. 71. The transferee of a portion of an indivisible decree is not entitled to take out execution for the portion transferred to him. 35 A. 204; 15 P.R. 1917. But if the whole decree is executed there can be no objection to its execution by the transferee. 17 C. 341; 15 P.R. 1917.

LIABILITY OF TRANSFEREE FOR COSTS OF APPEAL.—The Court has jurisdiction to make a transferee, who has been made a party respondent, liable for the costs of the suit *ab initio*, if he has been a respondent at his own desire or if he supports actively the decree. A transferee who takes no steps to support it must not be burdened with costs. 20 B. 167. Where a decree for costs of the High Court was assigned and costs recovered, but the decree was reversed in appeal to the Privy Council with costs in all the Courts, the decree-holder had no cause of action for a suit against the assignee to recover from him the costs realised by him in the manner described above. 24 A. 288.

Where A assigned his portion of the decree to B, a joint decree-holder, and the Court recognised the latter as the transferee under O. 21, r. 16; but on the former applying to the Court the order of recognition was reversed and before the order of the appellate Court which reversed that of the lower Court a payment was made to the assignor A, it was a valid payment and the assignee could not realise the amount. 29 P.R. 1871.

EXECUTION BY TRANSFEREE AND SUCCESSION CERTIFICATE.—When two decree-holders were awarded a certain sum under a decree jointly and certain other sum severally, then so far as the first is concerned, the surviving decree-holder after the death of the other can execute the decree, but so far as regards the sum awarded severally the decree cannot be executed without the production of a succession certificate. 10 O.C. 378.

RIGHT OF TRANSFEREE TO A REFUND OF CONSIDERATION.—When the Court refused to recognise a transfer on the ground that the transfer was incomplete, the transferrer is liable to a refund on a suit being lodged against him. 16 M. 325. By the assignment of the decree in writing, the property in the decree passes to the transferee and the decree is no longer liable to attachment as that of the transferrer. The assignee cannot fall back on the original consideration and cannot bring a suit on its basis while ignoring and repudiating the assignment. 33 M. 62. When the decree is already attached at the time of application for recognition as a transferee, the transferee is entitled to sue the transferrer for compensation. 20 M. 157; see also 5 M.L.T. 260.

III.—AGAINST WHOM EXECUTION MAY BE APPLIED FOR.

THE JUDGMENT-DEBTOR.—O. 21, r. 11 (1) provides that the application for execution must contain the name of the person against whom the application is made.

Judgment-debtor means any person against whom a decree has been passed or an order capable of execution has been made. (S. 2).

When there is one judgment-debtor, the decree may be executed, against him. When there are two or more judgment-debtors the decree may be executed against any one of them when their liabilities are joint, or in other words, the decree is jointly passed against them. 14 C.L.J. 354. But if the liabilities of several defendants are defined and determined by the decree it may be executed against them to the extent of their respective liabilities. A decree making the defendants jointly and severally liable is a joint decree, 20 W.R. 31. A joint decree always remains such notwithstanding any act or conduct of the decree-holder, 8 W.R. 132; 13 W.R. 128; 17 W.R. 497; 20 W.R. 31; 12 W.R. 304; 2 W.R. Mis. 49; 8 W.R. 201; 5 W.R. 9; 16 W.R. 49; 6 O.L.R. 212 (*contra* in 2 Hay. 297 and 14 W.R. 175, where it is held that when a decree-holder proceeds against some only of the defendants as if they were severally liable, the effect of the decree as to its being a joint one is destroyed). The fact that one of the judgment-debtors paid his share does not relieve him of the liability of the payment of the rest. 1 Agra Mis. 14. A release of one of the judgment-debtors does not release the others. The decree-holder can proceed against any of the other judgment-debtors. 11 I.C. 450; 39 M. 548; 44 C. 162; nor does it relieve the former from liability to contribute towards others. 11 I.C. 450. A decree-holder who obtains a simple money-decree can show in execution that the decree was obtained against the judgment-debtor in his capacity as manager of the family, 16 C.P.L.R. 19. A decree against a dead person cannot be executed against his representative. 55 I.C. 449=16 N.L.R. 138. There must be some one on the record representing the deceased for execution to issue against the deceased person. 65 P.R. 1867; 7 W.R. 52; 19 A. 337; 15 M. 399; 12 A. 440; 12 M. 211; 6 M. 180; 22 M. 119; 5 I.C. 339=7 M.L.T. 270 (*contra* 25 B. 337 P.O. and 6 A. 255 old law; 23 C. 683).

Benamidar.—Execution cannot be taken out against a benamidar of the judgment-debtor. 14 C.W.N. 774.

When one of the judgment-debtors is made to satisfy the whole decree, his remedy against the other judgment-debtors is by a regular suit for contribution, 8 C.L.R. 34.

Execution against a minor.—A guardian *ad litem* of a minor defendant appointed in the suit does not continue as such without a fresh application during execution proceedings. Where a decree is sought to be executed against a minor whose estate is under the management of the Court of Wards and the manager of the Court of Wards appears and asks to be appointed as guardian *ad litem*, he should be so appointed as guardian *ad litem* under S. 51 of the Bengal Court of Wards Act. 84 I.C. 68=28 C.W.N. 963. An application for execution, against minor judgment-debtor represented by his guardian is in accordance with law even though no separate application is then made for the appointment of the guardian. 48 I.C. 415; 48 I.C. 245.

A mortgage decree cannot be executed against some of the owners of equity of redemption. 47 I.C. 907.

EXECUTION AGAINST THE LEGAL REPRESENTATIVE OF THE DECEASED JUDGMENT-DEBTOR.—(1) Where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased.

(2) Where the decree is executed against such legal representative, he shall be liable only to the extent of the

property of the deceased which has come to his hands and has not been duly disposed of ; and for the purpose of ascertaining such liability, the Court executing the decree may of its own motion or on the application of the decree-holder, compel such legal representative to produce such accounts as it thinks fit. (S. 50, C.P. Code).

SCOPE.—This section applies to representatives after the decree is passed against the judgment-debtor. 28 M. 381 ; 7 M. 255 ; 12 A. 440, F. B. ; 17 A. 162 ; 55 I.O. 449 ; (6 M. 180 and 22 M. 119 are no longer good law under the present Code). The rights of a decree-holder under this section are not affected by S. 104 of the Probate Act which directs debts to be paid equally and rateably out of the assets. 22 M. 194. This section does not authorise an application by the representative of a deceased judgment-debtor to be placed on the record. 28 M. 361. When the judgment-debtor dies during the pendency of execution proceedings it is not compulsory upon the decree-holder to have the heir brought upon the record on penalty of the decree abating. It is open to him to apply under S. 50, C.P. Code, for execution of his decree as against the heirs. There is nothing in the C.P. Code which lays it down that the Court cannot on the decree-holder's application bring the heir of a judgment debtor upon the record in execution proceedings and continue the same against him. Nor is there anything in the law which lays it down that on the death of the judgment-debtor any pending execution proceeding shall abate. 42 A. 570. S. 50, C.P. Code is imperative only when no execution is pending and the decree has not been fully realised. 70 P.R. 1897. When execution proceedings are once commenced against the judgment-debtor, they can be continued after his death by substitution of the name of the legal representative in place of that of the judgment-debtor in the application for execution. It is not necessary to file a fresh application. 34 B. 142 ; 2 I.O. 18.

LEGAL REPRESENTATIVE.—Legal representative means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued. (S. 2 (11), C.P. Code).

When the judgment-debtor dies and the stranger takes possession of his property, the decree may be executed against him. It was otherwise under the Code of 1882. 17 M. 186 ; 115 P.R. 1913 ; 30 C. 1044 ; 4 C. 323 ; 14 M. 454 ; 48 P.L.R. 1906 ; 21 B. 539 ; 4 C. 142, F.B. ; 4 C. 342. When upon the death of the judgment-debtor possession of his property is taken by a residuary legatee under his will and such legatee applies for letters of administration with the will annexed, the decree may be executed against him, though the letters of administration have not been granted to him on the date of the order of execution, because he is in possession of the estate of the deceased. 30 C. 1044.

A District Judge who has under S. 64 of Act II of 1874 taken possession of the assets of a deceased person is not his legal representative. A.W.N. (1899) 221. A decree against the representative of a kavilagom is binding upon his successor and his

kavllagom. 16 M. 452. Tarwad property in the hands of the karnavan's successor is not assets of the deceased in the hands of the successor to the Tarwad in order to satisfy the decree against the karnavan. 5 M. 223.

A son or a lineal descendant in a Joint Hindu family is a representative of his father under S. 53, O.P. Code. 34 C. 642 F.B. ; 1923 P. 143 ; 45 A. 455 ; 42 B. 54. When a decree is made against a widow personally, the widow's reversioners are not her representatives. 12 C. 458. Execution cannot be allowed against the widow's personal property on a decree passed against the husband. 19 A. 235.

Members of a joint Hindu family are not the legal representatives of a deceased member of such a family. 42 B. 504 ; 31 C. 224 ; 18 O. 157 P.C. ; 27 M. 106 ; 31 I.C. 4 ; 32 A. 404 ; 33 M. 423 ; 40 B. 329. On the death of a Hindu heiress after institution of a suit for recovery of possession of property belonging to the last male owner, the reversionary heirs of such male owner are her legal representatives. 33 A. 15. When a Hindu widow executed a release deed in favour of reversioners who agreed to pay the judgment-debt due by her, they can be brought on the record, after her death, as her legal representatives. 23 C. 454. On the death of a Hindu leaving a childless widow and a separated brother, the widow is the legal representative until one is appointed to the estate of the deceased. 8 B.H.C. A.C. 37. When a Hindu died leaving a widow and a brother and the brother took possession of the deceased's estate during the widow's lifetime, the brother was liable as legal representative of the deceased. 2 Ind. Jur. N.S. 234. The member who succeeds to the co-parcenary property does not do so as the heir or legal representative of his predecessor, and cannot be said to hold his assets. 34 A. 79. Under the Hindu law, a step-mother is no heir nor is the sister an heir except in the total absence of all the heirs. 5 W.R. 161. A nephew taking by survivorship is not liable under S. 53, O.P. Code, as legal representative. 78 I.C. 637. When a decree is passed against one of the two joint brothers and he dies during execution but before sale, his legal representative is his widow and not the surviving brother, for if it were still undivided property it would go to the surviving brother by survivorship. 16 B. 636.

The widow of a deceased Muhammadan who retains possession of the estate of the deceased in lieu of her dower is a legal representative of the deceased. 89 I.C. 534 — 1925 O. 515. A Hindu widow, although she takes in some respects only a qualified interest fully represents that estate and the succeeding heirs will be bound by a decree properly and fairly obtained against the widow. Similarly they will have the benefit of any decree obtained by her. 28 C. 636 (followed in 20 A. 341.) When a Hindu during the lifetime of his deceased brother (debtor) lived separate from him in a separate dwelling house their branches also being separate, the former was not the legal representative of the latter. 23 W.R. 231.

HINDU SONS AND GRANDSONS.—For the purposes of Ss. 50 and 52, property in the hands of a son or other descendant which is liable under Hindu law for the payment of the debt of a deceased ancestor, in respect of which a decree has been passed, shall be deemed to be property of the deceased which has come to the hands of the son or other descendant as his legal representative. (S. 53).

The sons of a mitakshara family have been made by express enactment under S. 53 of the Code, the legal representatives of their father in respect of the property which descends to them under the Hindu law and which is made liable for the satisfaction of the decrees passed by the Court. 1923 P. 143. It is only the son or lineal descendant of a deceased Hindu that comes within the scope of S. 53 of the Code, and there is no obligation on the part of any other co-parcener who has acquired rights by survivorship to pay up the decree debts of the deceased co-parcener. 45 A. 455; 42 B. 54. Ancestral property in the hands of a Hindu son is the assets under S. 53 C.P. Code. 34 C. 642; 9 I.C. 648=9 M.L.T. 481; 20 B. 385; 11 B. 37; 33 B. 39; 7 M. 339; 5 M. 234; 24 M. 689; 1 I.A. 321 P.O.; 27 M. 689; 12 W.R. 233; 23 W. R. 127; 10 M. 283 F.B. When ancestral property in the hands of the son is made liable under S. 53 C. P. Code for the debts of the father, the fact that the son dies subsequently and execution is sought against his heirs and legal representatives does not affect the operation of S. 53, as making the property in question any the less the father's property for the purposes of Ss. 50 and 52 of the C.P. Code. 24 I.C. 280=(1914) M.W.N. 954. If the son objects that the debt is immoral he can do so in execution. 20 B. 385; 11 B. 37; 33 B. 39. A debt arising out of a decree against a Hindu father for damages for breach of contract to sell property which turned out to be inalienable property is not an immoral or illegal debt. 6 S.L.R. 150. The bare fact that the father in a joint Hindu family consisting of himself and his sons makes in favour of the son a deed of gift of certain property does not afford any *prima facie* evidence that the property was not ancestral property of the family. A.W.N. (1877) 74. If the decree is not for an immoral or illegal debt against the deceased judgment-debtor the son is liable to the extent of the property taken by him by survivorship. 20 B. 385; 33 B. 39; 34 C. 642 F.B.; 7 M. 339; 12 W.R. 223; 23 W.R. 127; 71 I.C. 417=1923 A. 124. A decree passed against a member of a joint Hindu family is capable of execution against his son, though he left no self-acquired property and the son took ancestral property by survivorship. 34 C. 642 F.B. S. 53 is new in the present C.P. Code. It has been added in order to set at rest a question on which the various High Courts were divided in opinion. According to the Allahabad and Madras High Courts a decree could not be executed against ancestral property in the hands of the son and a regular suit was to be brought against the sons on the basis of their pious duty to pay the father's debts. 5 M. 223; 13 M. 265; 16 A. 449; 23 M. 106; 11 A. 302. A contrary view was taken by the Bombay and Calcutta High Courts which is adopted by the section. 23 B. 385; 33 B. 39; 34 C. 642. It is not with respect to every property that a Hindu son can be said to be the legal representative of his deceased joint father. A Hindu son may be a legal representative with respect to a certain property and he may not be one with respect to another. When the father of the deceased father is alive at the time of the death of the deceased, the joint family of which the deceased is a member is not liable to discharge his debt. Hence the crucial date for finding out the liability of a certain property is the date of the death of the deceased. The property which was liable to attachment at the date of death of the judgment-debtor is truly the property liable, and not the property which may be found liable at the date of attachment. The only property which the father could sell in his lifetime is, under Hindu law, the property that could be pursued by his creditors after his death. 1926 A. 220=91 I.C. 785.

Section 2 (11) includes within its scope any person who intermeddles with the estate of the deceased and hence the intermeddling even with a part of the estate makes him liable to the extent at any rate of the property taken possession by him. 115 P.R. 1913; 42 I.C. 122=(1918) Pat. 86. A person was a grove-holder and a tenant in a village and possessed a dwelling house in the inhabited site of the village. He died without heirs. The grove and the materials of the house passed to the Zamindar by custom as owner of the soil. It was held that the Zamindar was not the legal representative of the deceased. 23 I.C. 969=1 O.L.J. 86. A deceased person would not be represented

by the commanding officer acting under S. 177 of Act V of 1859. 85 P.R. 1870. A representative means a person who in law represents the estate of a deceased person. Hence a creditor has a right to sue the representatives of his deceased debtor, and of obtaining a decree against him if he can prove that there are assets of which they may become possessed and though it is not proved that assets have come into their hands. 33 A. 414. An executor *de son tort* is a legal representative of the deceased debtor within S. 2 (11) of the C.P. Code and is liable to be brought on the record under that section on the death of the defendant. 50 I.O. 951.

Heirs of an intestate are his legal representatives. 4 O.L.R. 193. A decree against a male proprietor governed by customary law may be executed against the ancestral landed property left in the hands of the widow who has come into possession on the usual life interest. 39 P.R. 1915. The properties of a deceased receiver in the hands of his legal representative are the estate in the hands of the latter and are liable to sale in execution proceedings and not by separate suit. 39 M. 484.

The purchaser of the business of a firm against which a decree has been passed is not the legal representative of the firm. 30 C. 961; 31 M. 464.

A transferee *pendente lite* is not a legal representative of the transferrer. 4 M.L.T. 190. When the holder of a non-transferable occupancy rights dies, crops grown by the successor cannot be attached in execution. 9 N.L.R. 137.

Official Assignee.—Where there has been an attachment before judgment and the property of the judgment-debtor subsequently becomes vested in the Official Assignee in insolvency previous to the decree the vesting order will prevent such an attaching creditor from executing his decree against the property. 10 C. 150 F.B.; 8 M. 554; 20 B. 403. When there is a legal representative on the record, a third person cannot be put on the record merely because he is in possession of the property. But the creditor can follow the debtor's property in such person's possession through the legal representative. 3 O.L.R. 497; 10 C. 713.

Successive deaths of the legal representatives.—If a legal representative of the judgment-debtor against whom execution has been taken out dies before the decree is fully executed, it may be executed against his legal representative to the extent of the assets of the original judgment-debtor that might have come into his hands. 22 A. 367. When execution is taken out against the widow of the judgment-debtor, a person who sells his property with or without the widow's consent is liable for the same. 11 I.A. P.C. When the execution of a decree is taken out against the widow of the judgment-debtor and A applied to be substituted as defendant on the ground that the real judgment-debtor was the benamidar for him, the heirs of the latter are liable. 8 W.R. 101.

A widow is the representative of her insolvent husband after his death and the existence of a vesting order does not affect her position as such representative. 22 C. 259. A suit against the legal representative of a deceased debtor should not be dismissed merely because he is not in possession of any portion of the estate left by the deceased. 89 I.C. 236. The estate in the hands of the mother of a deceased proprietor who derives her title by virtue of her marriage in the family is liable to attachment for debts of the previous holder of the estate. 1926 L. 7=90 I.C. 1052=26 P.L.R. 735.

FULLY SATISFIED AND FULLY EXECUTED.—The word "satisfied" has been substituted for the word "executed" in the present Code. Under the old Code the various High Courts held different views on the interpretation of the words "fully executed." According to the Madras High Court a decree could not be said to be fully executed until the property attached was sold and a sale held in pursuance of an attachment effected during the lifetime of the judgment-debtor. 6 M. 180; 22 M. 119. A

sale after the death of the judgment-debtor without bringing his legal representative on the record was illegal (*ibid*). According to the Allahabad High Court once the property was attached the decree was said to be fully executed and the property could be sold without the legal representatives being brought on the record. 12 A. 440; 17 A. 162; 19 B. 276; 23 C. 686; 11 O.W.N. 163; 6 A. 255. And a sale held after the death of the judgment-debtor without bringing his legal representative on the record was neither irregular nor void in spite of such omission (*ibid*). Under the present Code the words "fully satisfied" have been substituted to give effect to the view held by the Madras High Court and the legal representative of the deceased judgment-debtor should be brought on the record until the decree is fully satisfied. As to the effect of not bringing the legal representative of the deceased judgment-debtor on the record before the decree is fully satisfied, it is held to be an irregularity which would justify the sale being set aside by any person prejudiced thereby. 58 O.C. 549 = 23 I.C. 218; 19 B. 276; 23 C. 686; 18 O.W.N. 766. The view of the Allahabad and Madras High Courts has already been noted in this respect.

RESTRICTED LIABILITY OF LEGAL REPRESENTATIVE.—Application for execution.—The Code does not prevent any substantive application for substituting the legal representative of a deceased judgment-debtor. 2 C.L.J. 544. When execution proceedings are once commenced against the judgment-debtor they can be continued after his death by substitution of the name of the legal representative in place of that of the judgment-debtor in the application for execution. It is not necessary to file a fresh application. 34 B. 142; 2 C.L.J. 544. When attachments have been effected in execution of decrees against the last holder of an impartible estate, further execution proceedings can be taken against his representatives. 2 I.C. 18.

Application against the legal representative must made to the Court which passed the decree.—If a judgment-debtor dies after the decree is sent for execution to another Court, the application for substitution and execution must be made to the Court which passed the decree. 18 B. 224; 1 A. 431; 28 M. 466. If an order is made by the Court executing the transferred decree it is illegal and liable to be set aside. 28 M. 466 F.B. A contrary view is taken by the High Court of Calcutta in 22 C. 558, where it is held that an application for execution may be made in such a case to the Court to which the decree is sent for execution or to the Court which passed the decree. In a later Madras case it is held that a sale in execution of a decree by the Court executing a transferred decree is not bad; it is merely an irregularity. 28 M.L.J. 525. It is for the Court executing the decree to decide as to the extent of the liability of the legal representative; but it is for the Court that passed the decree to decide whether a person is or is not the legal representative of the deceased judgment-debtor. 17 A. 431. An application for substitution of the name of the legal representative of a deceased judgment-debtor must be made to the Court that passed the decree. 17 A. 431; 19 A. 337; 28 M. 466; *contra* see below. Such an application can be made to the Court to which the decree is transferred for execution and in any case if the application is not made to the Court passing the decree, it is a mere irregularity which is covered by S. 99, C. P. Code. 22 C. 558; 35 C. 1047; 1926 L. 34 = 26 P.L.R. 740.

Time for bringing the legal representative on the record.—After the death of the judgment-debtor the decree-holder should apply within six months of his death to bring his legal representative on the record on the analogy of O. 22, r. 4 and Art. 77, Limitation Act. 62 I.C. 52 (P.).

But execution does not abate in the absence of such an application.

Extent of liability of legal representative.—The creditor is entitled to attach and sell any property of the judgment-debtor in the hands of the legal representative

independently of the fact whether such property is up to the share of the judgment-debtor in the property of the deceased or is in excess thereof. The creditor has nothing to do with what each heir is entitled to. The section gives him a speedy remedy. 89 I.C. 584=1925 O. 515. The legal representative shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of. 36 A. 489; 12 W.R. 177; 15 W.R. 285; 68 P.R. 1895; 65 P.R. 1874; 22 W.R. 494; 22 W.R. 388. For the property of the deceased that would have come to the hands of the legal representative with due diligence on his part he is not liable in execution proceedings. The proper remedy of the decree-holder is by way of a regular suit against the legal representative. 11 B. 727; 12 C.W.N. 614; 33 A. 414. The representative of a judgment-debtor is liable to the extent of the property of the deceased that has come to his hands as well as the mesne profits whether in the shape of rents or of interest. 15 W.R. 285. The legal representative is bound to pay the full amount even though there may be other creditors of the deceased, left unpaid at the time and the assets may not be sufficient to pay them all. 22 M. 194; 24 I.C. 200. Where an heir or devisee unduly disposed of the assets of the deceased, he is liable for any unsatisfied decree and the decree-holder may follow the property in the hands of the transferee who knew that there were debts unpaid, and the transferrer did not mean to apply the proceeds of the sale for that purpose or when the transferee knew that there were not enough assets to pay the debts. Except as above the transfer of the property of the deceased, before the legal representative is brought on the record, for consideration is valid. 19 A. 504; 4 C. 897; 15 W. R. 476; 8 C. 20; 9 W.R. 271; 12 W.R. 177; 6 B.L. R. 54; 3 I.A. 241 P.C.; 4 C. 402 P.C.; 26 M. 792. A legal representative is not liable for the property of the deceased though he may purposely or negligently have failed to get the property into his hands from certain trespassers. 11 B. 727. The property of the deceased must be such as is capable of being disposed of. 21 I.C. 272. The representative does not stand in a better position than the deceased judgment-debtor and cannot resist execution on a ground which could not be urged by the latter if alive. 10 B. 74; 21 A. 277; 31 A. 45; 12 M.L.J. 24.

ASSETS OF THE DECEASED.—Although a jat following the ordinary custom in the Punjab has power to alienate his ancestral property for necessity, yet when he dies without exercising such powers and the property passes into the hands of his heirs, it ceases to be a part of the assets of the deceased for the due disposal of which the heirs are bound to account under S. 50, C. P. Code. 182 P.L.R. 1911=11 I.C. 375; 4 P.R. 1913; 15 I.C. 866. As the tenancy under the Punjab Act, V of 1912 in the hands of the heirs of the tenant is not liable to attachment the crops grown or reaped or standing after the tenant's death cannot be said to be the property of the deceased. 84 P.W.R. 1916=33 I.C. 741; 69 I.C. 520. Mere rights of action are not property within the meaning of this section. 11 B. 727. Assets means such assets as might be found in the hands of the legal representative at the date of the execution. 36 I.C. 901=14 A.L.J. 899. The assets left by the deceased are liable for the payment of the decree subject to the lien of the heirs created by the deceased. A lien for dower debt is such a charge. 80 P.R. 1915. Where A sued B for possession of land of which B had taken wrongful possession and after obtaining a decree A died and B succeeded him as heir, such property is liable under a decree obtained against B as heir of A as property come to the hands of B. 48 P.L.R. 1905. The property of a Rajah must be regarded as his assets in the hands of his legal representatives for the purpose of this section. 30 M.L.J. 39. Property obtained by a son on partition with his father cannot be said to be assets in the hands of his son. 24 I.C. 474=27 M.L.J. 112. The property of the deceased holder of an impartible estate must be regarded as assets in the hands of his legal representative for the purposes of S. 50 and can be proceeded against in execution of a decree against the last holder. 32 M. 429; 2 I.C. 18. The assets which a deceased member of a

Mitakshara family had in an impartible Raj as proprietor is not assets in the hands of the surviving members and proceedings under S. 50 cannot be taken against them. 31 O. 224 ; 6 C.W.N. 223 (not followed in 30 M. 454). A gratuity granted to the heirs of a deceased employed by a Railway administration is not assets of the deceased in the hands of his heirs and cannot be attached in execution of a decree against him. 9 O.L.J. 401=4 U.P.L.R. 96 ; 26 O.C. 53=69 I.C. 893. The rents and mesne profits are assets just as much as the real estate and the legal representative is bound to account also for the same. 30 M.L.J. 391=35 I.C. 224. The executor of a Mohamedan can sell the deceased's estate to pay his debts and it is said to be duly disposed of and is not liable for a decree as assets of the deceased. 6 B.L.R. 54 ; W.R. (1864) 99. Under S. 50 O.P. Code, read with S. 74 of the Dacca Agriculturists Act the legal representative is liable to the extent of the property which has come into his hands and S. 22 of the Act is no bar to the appointment of a Collector to manage the property in the hands of such legal representative. 15 S.L.R. 47=63 I.C. 310. Income which has become payable to an impartible Zamindari subsequent to the death of the Zamindar cannot be held to be assets of the deceased in the hands of the successor so as to be liable to attachment in execution of a decree obtained against the deceased Zamindar. 46 M.L.J. 376=83 I.C. 165. But the creditor would be entitled to enforce his debt as against the estate in the hands of the succeeding Zamindar if he is able to show that his debt was a sum of money borrowed for the benefit of the estate under S. 4 of the Madras Impartible Estates Act, and is therefore binding on the estate (*ibid*). The decree obtained against the Pandarasannidhi of a mutt for the money due on a pro-note executed by him for necessary purposes binding on the mutt, is enforceable against any person who is the representative of the mutt at the time of the execution proceedings subject to his right to set it aside for adequate reasons in a properly framed suit. 29 M. 553. When a decree was obtained against a Zamindari, which directed that certain land should be sold in the event of the debt not being paid as therein mentioned, the decree may be executed after the Zamindar's death against the sons and the land may be brought to sale. 7 M. 339. On the death of A, B took possession of the properties belonging to A claiming under an alleged testamentary disposition. A's collaterals disputed B's claim and a compromise was arrived at whereunder B agreed to give up A's estate on payment of a certain sum of money by the collaterals. The collaterals paid the money into Court and it was attached by C in execution of the decree which he had against A ; held that the money paid by A's collaterals to B, although paid to him in recognition of some antecedent right in A's estate was not the property of the deceased. 11 O.L.J. 441=81 I.C. 464.

Insolvent heirs.—S. 52 merely lays down the extent to which and the manner in which the debts can be recovered and in no way provides for the reservation for property to satisfy them when subsequent to a decree for realisation of the debts of a deceased Hindu from the estate in the hands of his heirs and before its execution the heirs become insolvents. The estate of the deceased like any other property of the insolvent rests in the Official Receiver and is immune from execution proceedings under S. 16 (2) of the Provincial Insolvency Act. 18 M.L.T. 147=30 I.C. 256. When ancestral property actually comes into the hands of the heirs and has not been charged by the original debtor in his lifetime it is not an asset which the Hindu heir in a joint family is bound to apply. 80 P.W.R. 1911=11 I.C. 376. Arrears of maintenance due to a Hindu widow after death are her assets. 11 B. 528.

Assets in the hands of heirs and executors or administrators.—Rents and profits after the death of a person form an accretion to the estate of the deceased in the hands of the executors, but an heir-at-law is not subject to the liabilities attaching to an executor or administrator for he is entitled to claim the property left by the

deceased as his own subject to any liabilities on the corpus of the estate created by the deceased before his death. 17 O.C. 207=25 I.C. 384 (7 A. 822; 19 A. 235, followed). The income of the property which has passed from Zamindar to the next; the property being an impartible Raj is liable in execution for the debts of the deceased Zamindar. Income which has accrued since the death of the late Zamindar and has come into the hands of the new Zamindar can be attached in execution for the debt of the late Zamindar and dealt with according to the provisions of the Code. 47 M. 411. Arrears of *vasika* allowance which accrued due in the lifetime of the *vasikadar* and were after his death paid to the heirs of the *vasikadar* are not liable to attachment in the hands of such heirs for satisfaction of the debts of the deceased. 49 I.C. 511=21 O.C. 329. The holder for the time being of a *deshmukhi watan* having only a life interest in the allowances pertaining to such *watan* allowances due after his death cannot be attached as part of his estate. 10 B.H.C. 299. The surplus sale proceeds of a non-transferable occupancy holding of the judgment-debtor which is sold after his death, are not, on payment to the legal representative, the assets of the deceased so as to be liable to attachment in execution of a money decree passed against the legal representative of the deceased. 89 I.C. 477=1925 N. 449.

DULY DISPOSED OF ASSETS.—If payments are made by the heirs rateably it does not follow that he has failed to apply the assets duly. Every payment on account of a debt is lawful, irrespective of its effect upon other creditors and is a due application of the assets under this section. 26 M. 792; 6 Bom. L.R. 1135. When a debt is due by the deceased to the representative, the latter can pay himself out of the assets as he cannot sue himself. 26 M. 792.

PERSONAL LIABILITY OF THE LEGAL REPRESENTATIVE.—If the representative cannot account for the assets left by the deceased that had actually come to his hands, he is liable personally to the extent of the value of such assets. 16 C. 1; 23 O. 454. But ordinarily the legal representative of a deceased judgment-debtor is protected from personal liability for the debts of the deceased. 31 C. 612; 17 M. 122; 11 B. 727; 20 M. 118; 25 O. 179; 13 O.C. 297; 80 I.C. 600=11 O.L.J. 554. To justify an order as to personal liability it must be shown by the person applying for execution that the legal representative has secured sufficient property to cover the decretal debt and the latter must fail to show that the amount that has come into his hands has been duly disposed of. (1924) M.W.N. 207=79 I.C. 894. When it is proved that the heir of a deceased has received assets, such heir is bound to pay debts of the deceased to the extent of such assets. 22 W.R. 388. If personal liability is proved he may be arrested. 12 W.R. 517. But the decree-holder cannot acquire any personal right against the representatives for the mere reason that the Land Alienation Act (Punjab) deprived him of the right of selling the property of the deceased debtor come into the hands of the representatives. 123 P.R. 1906.

LIABILITY IN CASE OF DECREE AGAINST A DEAD PERSON.—When a decree is obtained against a person after he is dead it is a nullity, and execution cannot issue against his legal representative. 14 B.L.R. 334; 16 N.L.R. 138=55 I.C. 449; 20 I.C. 506=17 C.L.J. 634. But when a defendant dies after the hearing of the case and before judgment the decree is not bad. 19 B. 807; 21 A. 314.

ENQUIRY AND BURDEN OF PROOF.—The Court executing the decree may of its own motion or on the application of the decree-holder for the purpose of ascertaining the liability of the legal representative compel him to produce such accounts as it thinks fit. 25 W.R. 224. S. 50 (2). The burden of proof that some property of the deceased has come into the hands of the legal representative lies on the decree-holder, even when specific property is seized as that of the deceased judgment-debtor. 4 C.W. N. 151; 42 I.C. 122=(1918) Pat. 86; 8 W.R. 195; 18 W.R. 185; 3 M.H.C. 161.

When it is so proved then it is for the legal representative of the deceased to prove that he has duly disposed of the assets and the extent of the assets that came into his hands. 8 W.R. 195 ; 18 W.R. 185 ; 11 B.L.R. 149 ; 21 M.L.J. 1096 = 12 I.O. 253 ; 25 W.R. 224 ; 3 M. 359 ; 30 M.L.J. 391. It is for the representative to prove that the amount of the assets is not sufficient to satisfy plaintiff's claim or that they are of such a nature that the plaintiff is not entitled to be satisfied out of them, or that there never were any assets or that they have been duly administered and disposed of in satisfaction of other claims. 42 I.O. 128 = (1912) Pat. 86. On application by the decree-holder the Court should decide whether a particular person is or is not the legal representative of the judgment-debtor and it is for the Court to decide as to the extent of the legal representative's liability. 17 A. 431. When the Court finds that any person is the legal representative, his name may be entered on the record without trying the question whether he has got assets of the deceased judgment-debtor, 18 W.R. 185 P.C. ; 14 W.R. 431 ; 11 B.L.R. 149 P.C. ; 2 M.H.C. 423 ; 115 P.R. 1913. Once it is admitted or proved that the person sought to be made liable under a decree obtained against a deceased person had come into possession of assets belonging to the estate of the deceased judgment-debtor, it is for him to satisfy the Court as to the extent of the assets received by him and to account for them. 12 I.O. 253 = 21 M.L.J. 1096. When a party is proceeded against as the legal representative of a deceased judgment-debtor and it is proved that property belonging to the deceased judgment-debtor has come into his hands, it lies upon such party to account for all the property of the judgment-debtor which has come into his hands and in so accounting mesne profits must be brought into account. 15 W.R. 285. On application by the decree-holder to substitute the name of a legal representative on the record an issue should be raised whether such person is the legal representative. 6 O. 777. The decree-holder must show that the legal representative has assets of the deceased judgment-debtor, but when the receipt of such assets is admitted, the burden of proof that the assets so received are not sufficient to pay the whole judgment debt or were already properly paid in satisfaction of the other debts of the deceased is upon the representative. 25 W.R. 224.

Presumption as to value of property.—When a person, who has wrongfully converted property, will not produce it, it shall be presumed as against him to be of the best description. 115 P.R. 1913.

LIABILITY OF TRUE REPRESENTATIVE WHEN EXECUTION ISSUED AGAINST A WRONG PERSON AS THE LEGAL REPRESENTATIVE.—When the decree against a holder of an impartible estate is executed against the widow of the deceased judgment-debtor while the successor to the estate is not made a party to the execution proceedings, the successor is not bound by the execution proceedings. 34 A. 79 ; 34 A. 404. When a remote reversioner is impleaded as a legal representative, and in execution of the decree the decree-holder purchased the property of the deceased, held that the true heir of the deceased is not bound by the sale in execution. 35 I.O. 124 = 31 M.L.J. 222. A sale of property of a deceased judgment-debtor is binding if the estate is sufficiently represented *quoad* such property. 21 B. 539. An application for execution against persons alleged to be the legal representatives is not bad under Art. 182 (5) of the Limitation Act merely because the persons named therein are subsequently found not to be such. 20 O. 388 ; A.W.N. (1892) 241 ; *contra* in 34 A. 404.

DECREE FOR INJUNCTION.—A decree for an injunction obtained against a defendant may on the death of the judgment-debtor be enforced against his son as legal representative. 26 B. 283. But such a decree cannot be enforced against the purchaser of the property from the defendant, as an injunction does not run with the land. The remedy of the decree-holder is to bring a fresh suit for an injunction against the purchaser. 26 B. 140 ; 1 B.L.R. 854 ; 32 B. 181.

NOTICE.—Notice must first be issued to the legal representative of the deceased judgment-debtor under O. 21, r. 22. See O. 21, r. 22.

EQUITABLE JURISDICTION OF THE COURT.—Where execution is sought against a legal representative of the deceased judgment-debtor and the legal representative offers objection to the execution, the matter is left to the discretion of the Court and the Court can under O. 21, r. 23 (2), O. P. Code, make such orders as it thinks fit. The Court will in a proper case exercise its equitable jurisdiction and consider the equities between the several representatives. 13 S.L.R. 138=52 I.C. 906.

EXECUTION WITHOUT A LEGAL REPRESENTATIVE OF THE JUDGMENT-DEBTOR ON THE RECORD.—Execution of a decree whether by appointment of a receiver or otherwise cannot proceed against a judgment-debtor who is dead and whose representatives are not on the record. 78 I.C. 1031. There must be some one on the record representing the deceased for execution to issue against the estate of such deceased person. 65 P.R. 1867; 7 W.R. 52; 19 A. 337; 15 M. 399; 6 M. 180; 22 M. 119; 5 I.C. 339=7 M.L.T. 270 (*Contra* in 25 B. 337 P.C. and 6 A. 255; 12 A. 440 F.B. is old law.) See 35 C. 1047. If a judgment-debtor dies after attachment the property may be sold without making the legal representative a party. 12 A. 440 F.B. 17 A. 162; 19 B. 276; rulings under the old Code. Even under the old Code a different view was taken by the High Court of Madras and it was held that a sale of debtor's property after his death, but without his legal representative on the record is bad even if the judgment-debtor has died after the attachment of the property. 15 M. 399; 6 M. 180; 22 M. 119. In a case to which the section is applicable, i.e., when the judgment-debtor dies and no execution is pending, an application for execution made without the legal representative of the deceased being brought on the record is not in accordance with law. 19 A. 337; 7 W.R. 52. When the party on the record in an appeal is himself a legal representative of a deceased judgment-debtor and in possession of part of the assets of the deceased, he has no right to object to the execution of the appellate decree on the ground that the legal representative of the deceased had not been brought on the record. 28 I.C. 925. When in execution of a mortgage-decree, the mortgagee, who had notice of the death of the judgment-debtor, without bringing on record the legal representatives brought the property to sale, and purchased it himself, it was held that the sale was a nullity against the representatives of the judgment-debtor. 23 I.C. 251=26 M.L.J. 267.

APPEAL.—See S. 47.

ENFORCEMENT OF DECREE AGAINST LEGAL REPRESENTATIVE.—

(1) When a decree is passed against a party as the legal representative of a deceased person and the decree is for the payment of money out of the property of the deceased, it may be executed by the attachment and sale of any of such property.

(2) Where no such property remains in the possession of the judgment-debtor and he fails to satisfy the court that he has duly applied such property of the deceased as is proved to have come into his possession, the decree may be

executed against the judgment-debtor to the extent of the property in respect of which he has failed so to satisfy the court, in the same manner as if the decree had been against him personally. (S. 52.)

SCOPE.—S. 52 merely lays down the extent to which and the manner in which the debts can be recovered, and in no way provides for the reservation of property to satisfy them. When subsequent to a decree for the realisation of the debts of a deceased Hindu from the estate in the hands of his heirs and before its execution the heirs become insolvents, the estate of the deceased like all other property of the insolvents vests in the Official Receiver and is immune from execution proceedings under S. 16 (2) of the Provincial Insolvency Act. 18 M.L.T. 147=30 I.C. 256. When the defendant along with another person took possession of the assets of the deceased and disposed of a portion thereof without any right and when the property disposed of was sufficient to exceed the debts, a personal decree can be passed against the defendant. 20 M. 44.

DECREE AGAINST LEGAL REPRESENTATIVE.—The debt for which the decree is passed may become due before or after the debtor's death. 12 W.R. 233. A plaintiff is entitled to sue and on proof of his debt to obtain a decree against the legal representatives of his deceased debtor without proving that assets have come into his hands. It is sufficient if there are assets of which he may become possessed. 8 B. 309; 13 B. 653; 11 P.R. 1881. The existence of assets and receipt or possession thereof by the representative must be enquired into before decree unless a *prima facie* case of receipt or right to receive not denied by the defendant appeared, 65 P.R. 1874; 12 P.R. 1875. A joint decree may be passed against heirs inheriting equally. 15 W.R. 192. In a suit against the legal representative of a debtor the plaintiff is entitled to a decree if he proves that any assets belonging to the deceased debtor exist. He is not bound to prove the existence of such assets. 56 I.C. 962. A personal decree may be passed against the legal representative if it be proved that he received assets sufficient to meet the debt. 20 M. 446. A decree obtained against an executor or administrator of the estate of a deceased person is a decree against the estate of the deceased. But a decree against the heirs of a deceased Hindu or Muhammadan is not a decree against the estate of the deceased. Hence a decree obtained by a creditor of a deceased Hindu against a wrong heir cannot be executed against the rightful heir in possession of the property and a fresh decree must be obtained against such heir. 33 M. 75. The decree must be against the assets of the deceased. Marsh. 611; 65 P.R. 1874; 9 O. 406; 24 W.R. 383; 18 M.L.J. 36. A decree cannot be passed against the representatives as partners in the firm. 34 B. 244. A suit against the legal representative of a deceased should not be dismissed merely on the ground of his not being in possession of any assets of the deceased. 1926 N. 170=89 I.C. 236.

DECREE AGAINST SOME ONLY OF THE REPRESENTATIVES OR A WRONG REPRESENTATIVE.—When a decree is passed against a minor adopted son as representing the assets of the deceased father and the minor was represented by his adopted mother as guardian, and in a later suit the right of the adopted son to inherit the property was declared invalid, the execution could not proceed against the adoptive mother or widow by bringing her on the record as the legal representative of the deceased. 21 I.C. 519=18 C.W.N. 173. When a decree is passed against a wrong heir while the rightful heir is not a party to the suit, the latter will be bound by the execution sale if he either knowingly allowed the suit to be defended

by another person claiming to be the legal representative, or if knowing of the sale he stood by and allowed the purchaser to pay, in the belief that he acquired a good title. 8 B.H.C. A.C. 97 ; 3 C.L.R. 157. When the widow in a joint Hindu family obtained a decree for maintenance against the brother of her deceased husband, not expressed to be a decree against the head or representative of the family, *held* on execution against the debtor's representatives that the family property was not liable. 10 M. 282 F.B. A decree against one representative does not bind the others. 4 C. 142 F.B. ; 8 C. 370 ; 7 A. 822 F.B. ; 11 C.L.R. 268 ; 11 M. 408 ; 2 C. 395 ; 14 C. 464 ; 1 A. 157.

Mortgage-decree.—When in a mortgage suit the debt is due from the father, and after his death the property is brought to sale in execution of a decree against the widow or some of the heirs of the mortgagor and the whole property is sold, then the heirs not brought on the record cannot be permitted to raise the objection that they were not bound by the sale simply because they were not parties on the record. 20 B. 338 ; 12 B. 101 ; 14 B. 597 ; 5 B. 8 (*contra* held in 8 C. 370 ; 23 A. 263).

The recovery of the share of the non-joined heir may be made contingent on his paying a proportionate share of the debt. 7 A. 822 F.B. ; 7 A. 716. The general rule is that a decree against one representative does not bind the others. 4 C. 142 F.B. ; 8 C. 370 ; 7 A. 822 F.B. When a remote reversioner is impleaded as a legal representative and in execution of the decree, the decree-holder purchased the property of the deceased, it was *held* that the daughter who was the true heir of the deceased was not bound by the decree and the sale in execution. 35 I.C. 124—31 M.L.J. 222. The holder of a decree against certain executors and the adopted son of the deceased testator, which was obtained in respect of moneys borrowed with the sanction of the court for the deceased's funeral expenses cannot enforce it against the estate in the hands of the legal heir of the deceased who had since got into possession of it after setting aside the will and the adoption inasmuch as such legal heir was not the legal representative of the debtor in the suit. In order to make the estate liable the proper course for the decree-holder would be to bring a regular suit against the legal heir. 14 C. 316 ; 18 C.L.J. 362. A decree obtained against the sons of the deceased defendant as the ostensible representatives cannot be executed against the estate in the hands of the executrix. The remedy of the decree-holder is either to have the decree vacated, the suit restored, the executrix brought on the record, and a new decree made against them ; or to institute a suit on the judgment and obtain a decree against the executrix. 30 I.C. 824—20 C.W.N. 58. A decree obtained by a creditor of a deceased Hindu or Mohamedan against a wrong heir cannot be executed against the rightful heir in possession of the property, and a fresh decree must be obtained against such heir. 33 M. 75 ; see also 9 B. 86 ; 4 A. 193. When the deceased's share in a joint family property did not at his death pass to his widow but, there being no male issue, it passed to the other members by survivorship, it could not be rendered liable for the debts of the deceased in a decree against the widow. 3 B.L.R. 31 F.B.

Decree against a Hindu widow or other female.—The determination of the exact interest passing at a sale under the words "right, title and interest" of a Hindu widow in properties depends upon the question whether the suit was brought against the widow upon a cause of action personal to herself or upon one affecting the whole inheritance of the property in suit. 10 C. 985 P.C. ; 11 C. 45 ; 24 B. 135 ; 2 Hay. 8 ; 7 C. W.N. 619 ; W.R. 119 F.B. ; 4 M. 375 ; 10 C. 823 ; 3 C. 357 ; 6 C. 36 ; 16 C. 511 ; 3 B. 237 ; 1 C. 133 ; 24 W.R. 306 ; 3 C.L.R. 473. Such questions are to be determined upon view of the decrees and the sale proceedings and the substance of the transaction and the court cannot go behind these documents. 3 C.L.R. 590 ; 24 B. 136. A decree against the widow for her husband's debts binds the whole estate. 24 W.R. 3 ; 11

I.A. 49 P.C. In such a case her personal property is not liable, 19 A. 235. When the decree was against the husband's estate and it was obtained against the widow as representing his estate, the decree would bind the estate whether the widow or a son adopted by her was the proper representative, 11 C. 45 ; 24 W.R. 306 P.O. = 2 I.A. 275 ; 16 C. 40 P.O. (*contra* in 16 M. 409). In a suit against a widow as guardian of her minor son for a debt due by her husband a decree was given against her as representative in possession and ostensible owner of her husband's estate. A sale under the decree nominally of the widow's interest carried the deceased's interest, the certificate having reference to the decree. 17 W.R. 459 P.O. A widow sued as her minor son's guardian cannot be held liable in her own person as well as representative of the heirs of the husband, 15 W.R. 192. A decree was passed against a widow in her representative capacity. In one place the advertisement of sale stated that the property to be sold was widow's property and at another place it stated that the interests of the debtor were to be sold, it was held that the property intended in the sale certificate for sale was the rights and interests of the widow as representative of her husband and not personally, Marsh, 614 = W.R. 119 F.B. When the suit is against the widow on a personal claim, only her limited interest can pass in execution, 17 M. 208 ; 12 C. 458 ; 3 C. L.J. 530 ; 15 C.P.L.R. 85. A decree against "the widow of a deceased and mother of B and C minors" was held not to make the minors' interest in the estate liable for the decretal amount, 4 C. 677. A Hindu widow, although she takes in some respects only a qualified interest, fully represents that estate, and the succeeding heirs will be bound by a decree properly and fairly obtained against the widow. Similarly they will have the benefit of any decrees obtained by her, 23 C. 636 ; 20 A. 341. A decree against a Hindu widow did not bind the minor sons, who were not represented in the suit, nor were they made parties to it, 5 B. 14. Such a decree does not bind the reversioners' interest, 3 B.L.R. 31 F.B. When a Hindu widow executes a release deed in favour of reversioners who agreed to pay a judgment-debt due by her they can on her death be brought on the record as her representatives, 23 C. 454. So long as no legal representative has been appointed the childless widow of a separate Hindu is the only person who can defend a suit as his representative, 8 B.H.O. A.O. 37. When execution is taken out against a widow for a money decree obtained against her husband and her right, title and interest as his representative are sold and conveyed to the purchaser, the daughter of the deceased cannot recover the properties from the purchaser as heir to her father upon the death of the widow, 5 M. 5 ; 14 M.I.A. 605. When a Hindu widow's suit to recover possession of certain property belonging to her deceased husband was dismissed with costs, and the widow died before execution was taken out, it was held that inasmuch as the widow did not by her suit seek to recover any interest personal to herself, the decree-holder could execute the decree for costs as against the next heirs of her late husband who had succeeded to the whole estate and who were his legal representatives, 6 C. 479 ; 23 C. 636 ; 7 C.W.N. 678 ; 8 C.W.N. 843 ; 11 C.W.N. 593 ; 15 C.W.N. 359. When a claim against a deceased debtor is decreed against the adopted son who was a minor and represented by the deceased's widow, and such son is subsequently proved as not having been validly adopted, the decree-holder is not entitled to ask for the substitution of the widow's name and execute the decree against her, 21 I.C. 519 = 18 C.W.N. 173.

DECREE AGAINST HINDU SON.—For the purposes of Ss. 50 and 52, property in the hands of a son or other descendant which is liable under Hindu Law for the payment of the debt of a deceased ancestor, in respect of which a decree has been passed, shall be deemed to be property of the deceased which

has come to the hands of the son or other descendant as his legal representative. (S. 53) See notes, *supra*.

Ancestral property in the son's hands is liable for a father's debt incurred as a surety or otherwise. 23 B. 454 ; 3 M. 42 ; 12 W.R. 233 ; 8 B.H.C. 245 ; W.R. (1864) 1 Mis. ; 12 W.R. 41 ; 6 M. 293 ; 25 W.R. 202 ; 11 M. 373 ; 19 A. 26 F.B. ; 2 O.W.N. 603 ; 10 C. 1 ; 8 B. 220 ; 24 W.R. 364 ; 62 I.C. 905 = 6 Pat. L.J. 651 ; 6 Pat. L.T. 507 ; 88 I.C. 200 ; 19 I.C. 252. Under certain circumstances a decree can be executed personally even though the decree did not provide for it. (1916) M.W.N. 128 = 35 I.C. 614. The whole of the ancestral property and not merely the father's share is liable for a father's debt, not immoral or illegal. 16 C.L.J. 85 ; 27 O.C. 111 = 81 I.C. 15. A personal decree against the son after the death of his father on a Hundi executed by the father in the Mitakshara Hindu family can be executed only against the co-parcenary property in the hands of the son. 2 Pat. L.T. 396 = 99 I.C. 352 ; 65 I.C. 224 ; 27 O.C. 238. In a partition suit costs were awarded against A. After the decree A died. The decree-holder proceeded to execute the decree for costs and attached the share which had fallen to A at the partition but which after his death had passed into the hands of his sons. *Held*, that the sons were liable for the costs and the property in their hands was liable to attachment under S. 53, C.P. Code. 19 I.C. 252. Property obtained by a son on partition with his father cannot be said to be assets of the father in the hands of the son. 24 I.C. 474 = 27 M.L.J. 112. When on the death of a member of a joint Hindu family (Mitakshara) the son was brought on the record of a suit as his legal representative for the recovery of the debt due from the deceased and the court passed a decree declining to consider the alleged immoral nature of the debt as it did not arise in the suit against the father, the son would be entitled to raise the question of the legality of the debt in execution proceedings. 147 P.R. 1907 (11 C. W.N. 598 F.B., applied). When a decree under S. 90, T.P. Act, against the legal representative of a deceased person directs that the amount thereof be realised *from such property only as belonged to the deceased personally* the decree-holder cannot take advantage of S. 53, C.P. Code, and attach ancestral property which passed by right of survivorship to the son of deceased. 9 I.C. 631. A Hindu son sued for his father's debt is liable only to the extent of the co-parcenary property in his hands and the decree though passed as a personal decree against him could not be executed against the separate property of the son. 65 I.C. 224. A Hindu son is liable for the unsatisfied debt of his deceased father to the extent of the ancestral property unless he shows that the debt was contracted for an illegal or immoral purpose. This is so even if the son was a party to the decree against the father. 20 A.L.J. 969. It is not necessary in order to establish a son's liability for his father's debt that it should be shown that the debt was contracted for the benefit of the family. If the existence of the debt be proved and the sons cannot make out that the debt of the father was tainted with immorality or was of such a character as not to fall within their pious duty to discharge, their interest cannot be exempted from attachment. 27 A. 16 F.B. (12 A. 209 overruled) ; 30 A. 156. When at the date of the suit by a creditor against a Hindu father it was found that the sons were divided from their father and the suit was not for the enforcement of the father's debt against the sons also, the property of the sons is not liable to attachment. 8 I.C. 131 = 8 M.L.T. 349. The disposition of the family estate by the father in a joint Hindu family or a disposal of it in execution proceedings taken against the father alone would bind the son's as well as father's interest except so far as the son can establish in a proceeding taken for that purpose that the enforced disposal was on account of an obligation to which the son was not subject. 11 B. 37 ; 14 B. 320 ; 20 B. 365. When a decree is passed against the father in respect of property which would ordinarily be under Hindu law liable for the payment of his debts, such property is the property of the deceased in the hands of his sons or other

descendants for the purposes of Ss. 50 and 52. 46 M.L.J. 471—89 I.C. 985. A son who has not inherited his father's estate is not liable for his father's debts. 1864 W.R. Mis. 1; 12 W.R. 41; 8 B.H.C. 245; 13 B. 653. The creditor cannot proceed against the personal property of the son. 27 O.C. 238—1925 O. 113. A Hindu father can lay the estate open to be taken in execution proceedings, by incurring debts, so long as they are not for an immoral purpose; and the son is liable for the same. 49 B. 113; 91 I.C. 785.

Decree against Co-parceners.—A mortgage-decree obtained against one of the members of an undivided Hindu family who alone had executed the mortgage and who had not been impleaded as the managing co-parcener or representative of the family does not bind his other brothers. 10 M. 316. A decree-holder, who having obtained a money decree against a member of a joint Hindu family took no steps in the lifetime of such member to obtain attachment under, or in execution of, the decree, cannot bring to sale, after the death of the judgment-debtor, the interest which the latter had in the joint family property. 11 A. 302.

Decree against Co-administrator.—When one administrator acts on behalf of the other and fully represents the estate, a decree passed against him and against the estate represented by him is perfectly valid. An auction held in execution of such a decree is perfectly valid and binding on the estate. 26 I.C. 369—17 M.L.T. 18.

Decree against a Mohamadan.—Under Mohamadan Law a decree against one heir does not bind the other heirs of the deceased. 7 A. 822; 7 A. 716; 1 A. 57; 23 A. 263. And a decree against a wrong person as legal representative does not bind the rightful heir. 11 M. 409; 2 C. 393; 11 O.L.R. 268. When one heir of a Mohamadan mortgages property of the deceased, the purchaser takes it subject to the mortgage. March 509. When a decree was passed against the minor son of a deceased debtor (Mohamadan woman) represented by a guardian and the debtor's interest was sold, the sale passed the share of the deceased in the property entirely, including the interests of heirs not parties to decree. 12 B. 101; 20 B. 338; see also 14 B. 597; 19 B. 273.

WHO CAN OBJECT TO EXECUTION.—A person not a party to the suit cannot object to the execution of the decree. 19 B. 544. The Court cannot entertain an objection to an execution by a person who is not a party to the decree. 61 I.C. 759—13 L.W. 143.

EXECUTION AGAINST AN INSOLVENT.—The provisions of S. 49 of the insolvency Act are not directory or imperative, but merely permissive, and even after a vesting order has been made and the schedule of the insolvent has been filed the Court has power under O. 21, r. 37 to direct execution against the person of the defendant by his arrest and imprisonment in cases of fraud or misconduct although the amount of the judgment debt is fully admitted by the insolvent in his schedule. 9 Bom. L.R. 898. Where there has been attachment before judgment and the property of the judgment-debtor subsequently becomes vested in the Official Assignee in insolvency previous to the decree, the vesting order will prevent, such an attaching creditor from executing his decree against the property. 10 C. 150 F.B.; 8 M. 554; 20 B. 403. A Court of Small Causes has no jurisdiction without the leave of the High Court to entertain an application for execution after the adjudication of the judgment-debtor, and a security bond taken for the appearance of the judgment-debtor is void. 39 M. 669. After Bankruptcy and before discharge whatever property a bankrupt acquires belongs to his trustee, save only what is necessary for his support. And for this purpose there is no difference between the personal earnings and salary. So the salary of an officer vests in the Official Assignee. 7 I.C. 180—8 M.L.T. 202.

IV.—LIABILITY OF SURETY.

ENFORCEMENT OF THE LIABILITY OF SURETY.—Where any person has become liable as a surety—

- (a) for the performance of any decree or any part thereof; or
- (b) for the restitution of any property taken in execution of a decree, or
- (c) for the payment of any money, or for the fulfilment of any condition imposed on any person under an order of Court in any suit or in any proceeding consequent thereon,

the decree or order may be executed against him, to the extent to which he has rendered himself personally liable, in the manner herein provided, for the execution of decrees, and such person shall, for the purpose of appeal be deemed a party within the meaning of S. 47 :

Provided that such notice as the Court in each case thinks sufficient has been given to the surety. (S. 145).

LEGAL CHANGES.—The corresponding S. 253 of the old Code ran as follows :—

Whenever a person has, before the passing of a decree in an original suit become liable as surety for the performance of the same or of any part thereof, the decree may be executed against him to the extent to which he has rendered himself liable in the same manner as a decree may be executed against a defendant : Provided that such notice in writing as the Court in each case thinks sufficient has been given to the surety.

1. The old section applied only to sureties for the performance of decrees. The present section applies to sureties as well as for the restitution of property taken in execution of a decree or for the payment of any money or for the fulfilment of any condition imposed on any person under an order of the Court in any suit or in any proceeding consequent thereon. 23 C. 212.

2. The present section applies to sureties for the performance of any decree whether original or appellate. It was doubtful and a point of dispute whether the old section applied to decrees other than those passed in suits. It was held by the High Court of Calcutta that the section did not apply. 22 C. 25 ; 23 C. 212. While on the other hand it was held by other High Courts that it applied in the case of appellate decrees. 12 B. 411 ; 25 B. 409 ; 17 A. 99 ; 13 M. 1.

SCOPE AND OBJECT.—Where the decree did not bind the surety the decree-holder was not entitled to execute it against him. 9 C. 383. If a bond for the production of a judgment-debtor is to apply not only to the particular proceedings in execution in which the security is given but to all the future proceedings, the bond must say so. 21 I.C. 612.

Surety for production of property.—When in execution of a decree, the property is made over to a third person for safe custody on his executing a bond with sureties to produce it when required, the decree-holder, on his failure to produce, cannot proceed

to enforce the bond against the sureties, but should get the bond assigned to himself and sue on it. 60 I.O. 134=39 M.L.J. 472. When a condition is imposed on a surety under an order of court the surety can be compelled to fulfil that condition in execution proceedings, under S. 145, without any second formal order being passed against the principal. A surety can be proceeded against as soon as the decree is capable of execution or the property becomes liable to restitution. 64 I.O. 430. A compromise was arrived at between the decree-holder, the judgment-debtor and a claimant to the property whereby a promissory note for a further sum was given and it was covenanted that the rest of the decree-holder's claim would be satisfied by paying a certain sum in annual instalments and the claimant stood surety making himself liable if the judgment-debtor failed to pay two consecutive instalments. The liability could be enforced under S. 145, C.P. Code. 38 A. 327.

S. 67, T.P. Act, and Security.—When a security is given during the pendency of an appeal, for the due performance of the decree, for the purpose of obtaining a stay of execution of the decree, the properties comprised in the security bond can be proceeded against in execution without instituting a suit under S. 67 of the T.P. Act. 51 C. 150.

Personal liability only.—S. 145 applies only when the surety has rendered himself personally liable for the decretal amount. 19 C.W.N. 961=29 I.O. 149; 38 C. 754. If a surety bond creates a mortgage, the sale of the property cannot be effected by proceedings under S. 145, C.P. Code, but by a separate suit. O. 34, r. 14 applies in such a case. 19 C.W.N. 178=27 I.O. 365; 32 C. 494; 42 A. 158 P.C.

Surety bond taken out of Court.—S. 145 does not apply to proceedings for the enforcement of surety bonds taken by the decree-holder outside the Court. 24 M.L.T. 416=48 I.C. 940. But if the bond is not executed directly to the Court and is filed in Court under S. 58 of the C.P. Code for the realisation of the judgment-debt, it is enforceable in execution proceedings. 53 I.C. 673=10 L.W. 172.

S. 145 (c), C.P. Code, is wider in its scope and includes a case when security is given under S. 55 (4), C.P. Code. 34 I.O. 407=(1916) 2 M.W.N. 273. When a surety has executed a bond which did not restrict his liability to the execution case then pending, but indicated a perfectly general liability to pay the decretal amount, the decree-holder can, under S. 145 of the Code, enforce the decree as against the surety even though the execution case has been struck off. 5 Pat. L.J. 517=57 I.C. 303. This section applies to enforce the liability of the surety for a receiver of property. 59 I.O. 844=10 L.B.R. 236. In order to save the decree-holder from the trouble, inconvenience and expense of bringing a suit to enforce the security bond, S. 145 gives him a right and opportunity to enforce the bond in execution proceedings. The execution proceedings referred to are not in any way connected with the execution proceedings in which the security bond was filed but it may be any execution proceedings. A person becoming bound by an oral or a written contract is liable as a surety. 1926 C. 877. The bond need not be in favour of the Court. 1926 C. 877.

APPLICABILITY.—S. 145, C.P. Code, does not apply to a surety under the Guardians and Wards Act. 1926 S. 35=89 I.C. 342.

THE FOLLOWING SECURITIES (WHICH ARE EXPRESSLY PROVIDED FOR IN THE C. P. CODE) MAY BE ORDERED BY A COURT.—Security for costs of suit from the plaintiff residing out of British India. (O. 25, r. 1).

Security for costs of the suit from a woman plaintiff who does not possess any sufficient immoveable property within British India. (O. 25, r. 1).

Security for costs of the suit from the assignee or receiver of the insolvent. (O. 22, r. 8).

Security for costs of the suit already incurred from a retiring next friend of a minor plaintiff. (O. 32, r. 8).

Security for the costs of *appeal and suit* from any person is discretionary and from a person residing out of British India it is compulsory. (O. 41, r. 10.)

Security and further security for costs of appeal in the Privy Council from the appellant. (O. 45, r. 8).

Security for the due performance of such decree or order as may ultimately be binding upon the appellant when the execution is stayed by the Court. (O. 41, r. 5).

Security for the due performance of the decree appealed from or of any order which His Majesty may make on the appeal when the execution is stayed in the Privy Council. (O. 45, r. 15 (cl.))

When the judgment-debtor died and his estate became vested in the plaintiffs, the latter could not recover the amount from the surety. 44 M.L.J. 171-72 I.C. 1941.

Under S. 145 and O. 45, r. 15 an order or decree of the Privy Council can be executed against sureties who on behalf of the opposite party have given security either for costs or for the whole decretal amount that might become due from such party. 2 A. 604 F.B. (dissented from in 12 C. 452; 15 C. 497; followed in A.W.N. (1888) 13; 17 A. 99).

Security for the restitution of any property which may be or has been taken in execution of the decree or for the payment of the value of such property and for the due performance of the decree or order of the appellate Court from the respondent in an appeal when execution is allowed pending appeal. (O. 41, r. 6).

Security for the due performance of any order which His Majesty in Council may make on appeal, when execution is allowed pending appeal, from the respondent. (O. 45, r. 13 (b).) 19 M. 140; 3 O.C. 927; 12 W.R. 296.

Security from the defendant to produce and place at the disposal of the Court when required, the property or value of the same or such portion thereof as may be sufficient to satisfy the decree in case of attachment before judgment. (O. 38, r. 5 (1). 12 B. 71.

Security from the defendant in case of arrest before judgment for his appearance at any time when called upon while the suit is pending and until satisfaction of any decree that may be passed against him in the suit when he is arrested. (O. 38, r. 2.) 166 P.W.R. 1916=36 I.C. 73.

Security from the next friend or guardian of the minor for the suit who has not been appointed or declared by authority, or when so appointed, he is under some disability for the sufficient protection of the property from waste and ensurance of its proper application. (O. 32, r. 6). But the liability of the surety of the guardian to the minor's estate cannot be enforced under S. 145. 41 M. 40.

Security from judgment-debtor (when the Court to which a decree is sent for execution makes an order to stay execution) to restore property or discharge the judgment-debt. (O. 21, r. 26).

Security from the receiver to account for what he shall receive in respect of the property of which he is appointed a receiver. (O. 40, r. 3 (a).)

Under S. 145, a surety for the Receiver can be asked to pay the sum which he has bound himself to pay. 13 Bur. L.T. 91=59 I.C. 844. See also Receiver—Chapter IV.

Security, from the defendant for granting of leave to defend, for performance of the decree, if any, that may be passed against him in the case of summary suits. (O. 37, r. 3 (2).)

Security from the witness to attend at the next or any other hearing or until the suit is disposed of. (O. 16, r. 16.)

Security from the defendant who wants to set aside the *ex parte* decree, for performance of the decree that may be passed against him. (O. 9, r. 13.)

Security from the judgment-debtor that he will appear when called upon in any proceeding upon the application for execution and will within one month apply to be declared an insolvent. (S. 55 (4).) 5 Pat. L.J. 417=57 I.C. 303; 34 I.C. 407=(1916) 2 M.W.N. 273; 34 I.C. 247; 39 C. 1008; 15 W.R. 21=8 B.L.R. 205; 143 P.R. 1908; 65 I.C. 374; 14 W.R. 63.

Security from the sipurddar. Where an attaching officer acting under, O. 21, r. 43 C. P. Code, entrusted the property for safe custody and for production in Court to a villager and took a bond with two sureties it is not open to the decree-holder to enforce in execution the bond so taken against the sureties on failure to have the property produced in accordance with its terms. 39 M.L.J. 472=25 M.L.T. 220. Security given by the depository or custodian for the safe custody of property entrusted to him by the order of an executing Court can be realised by issue of summary process in execution against him. 20 N.L.R. 93. (See S. 47).

A party who seeks to obtain security after the decree has been executed must show special circumstances. 17 W.R. 521; 33 C. 927.

Security given to obtain the release of a judgment-debtor from imprisonment under S. 58, C.P. Code. 53 I.C. 673=10 L.W. 172; 65 I.C. 374=19 A.L.J. 968.

Security to produce certain debt-bonds in case the defendant in a suit should fail to produce them was, under the old Code, not covered by this section. 22 M. 268; 7 M. 284. Under the present Code, these rulings do not seem to be good law.

When a decree is passed on the basis of a compromise without any mention being made of the surety it cannot be executed against him under the terms of the surety bond. 45 I.C. 992=99 P.W.R. 1918.

S. 145 does not apply to a person who becomes a surety under O. 21, r. 43 in respect of properties taken possession of by the Court Amin and the decree-holder is not entitled to execute the decree against such a surety. 52 I.C. 410=(1919) M.W.N. 742.

Surety under adjustment.—When a person gives security for the performance of an adjustment duly certified to the Court by both the parties, his liability can be enforced under this section. 83 I.C. 870=17 B.L.R. 257.

When a person becomes a surety, not personally but on the hypothecation of the property for mesne profits that might be given against the debtor on appeal, the liability continues up to the stage of appeal to the Privy Council, and can be enforced in the suit itself by joining the surety as a party. The ascertainment of mesne profits in the suit is binding on the surety. 42 A. 158 P.C.

DISCHARGE OF SURETY.—When a decree is passed to the effect that if it remained unsatisfied after execution had been taken out against the principal judgment-debtor, the surety would be responsible for the default, the liability of the surety is not discharged by the decree-holder's giving time to the judgment-debtor to pay up the decretal amount, because S. 135 of the Contract Act does not apply to claims which have been decreed. 9 O.C. 28. A surety is not entitled to be discharged from his liability without proof of fraudulent misrepresentation or concealment on the part of the creditor or his agent. 3 N.W.P. 264. Discharge under O. 21, r. 55.—See Chapter VI.

Death of the judgment-debtor.—The liability of the surety continues notwithstanding the death of the person for whom he stood surety on the ground that the

cause of action survives against the representative of the defendant. 41 B. 402. The fact that the judgment-debtor has died does not absolve the surety from liability. 71 I.C. 46. The fact that the representatives of the judgment-debtor are brought on the record after the prescribed period of limitation, does not absolve the surety from liability. 12 C. 330.

Dismissal of suit or application.—The liability of the surety ceases as soon as the suit is dismissed (in the case of attachment before judgment) and the surety's liability is not revived by the appellate court decreasing subsequently the plaintiff's claim. 14 P.L.R. 1915=29 I.C. 271; 26 I.C. 76=(1916) M.W.N. 714; 5 I.C. 985; 72 I.C. 194; 3 Bur. L.T. 135; 13 W.R. 403. After the dismissal of an execution application the liability of the surety does not continue. 21 I.C. 612; 14 C. 757. Where the surety bond shows a perfectly general liability and is not restricted to the execution case then pending, the liability can be enforced after the striking off of the execution case. 1 Pat. L.T. 604; 43 I.C. 464=22 C.W.N. 919.

Imprisonment of the judgment-debtor.—Where a surety for the production of a judgment-debtor failed to produce him owing to the imprisonment of the latter in a criminal case and the surety knew of the pending criminal case against the judgment-debtor, the surety could not be discharged from the obligations under the surety bond. 19 A.L.J. 968. When the judgment-debtor was imprisoned in a case of embezzlement and the surety was aware of it and it could not be said that the surety could not have contemplated the possibility or perhaps even the probability of the judgment-debtor being sent to jail, he could not be said to have been discharged from his obligation under the surety bond by the circumstance of imprisonment of the judgment-debtor. 44 A. 174.

Dismissal of execution case against the judgment-debtor.—The mere fact that the execution case against the judgment-debtor was afterwards dismissed does not affect the liability of the surety under the bond. 22 C.W.N. 919=43 I.C. 464; 5 Pat. L.J. 407=57 I.C. 303.

Agreement to give time to the judgment-debtor.—An agreement to give time to the judgment-debtor must be for consideration in order to discharge the surety from liability. A gratuitous agreement does not discharge the surety. 22 A. 351; 23 A. 137; 4 C. 132; 4 C. 331 P.C.. If a consent decree is passed against the judgment-debtor without the knowledge and consent of the surety in the suit, the surety is discharged. 1926 C. 818.

ENFORCEMENT OF THE LIABILITY OF SURETY.—The mode of enforcing payment by a surety who has rendered himself liable as such is by a summary process in execution under this section. 23 B. 478; 25 B. 409; 31 B. 128; 23 M. 117; 6 N.W.P. H.C.R. 261; 3 C. 318; 59 I.C. 864=13 Bur. L.T. 91; 24 I.C. 474=(1914) M.W.N. 742. Where a surety is not made personally liable but he has created an equitable mortgage of his properties, the properties can be proceeded against in execution of the decree. 1926 C. 889; 1926 B. 279=28 Bom. L.R. 603. The decree that is executed against the surety is the decree passed in the suit and therefore it cannot be said that a second decree is passed against him. 1926 M. 674=49 M. 325.

Discretion of the court.—The court has a discretion to refuse execution against the surety. 23 Bom. L.R. 1263.

Inquiry.—If the jurisdiction of the court under the section is invoked and the applicability of the section is denied, the court must adjudicate upon the question and investigate the existence of the circumstances, upon proof whereof the court can take cognizance of the matter brought before it. If it is established that the person against whom execution is sought has become liable as surety, the court must exercise its

jurisdiction. If on the other hand such fact is not established, the application must be refused. 16 I.C. 859.

Extent of liability.—The decree or order may be executed against him to the extent to which he has rendered himself *personally liable*. The decree against the surety can be executed in the same manner as against the judgment-debtor and not otherwise. When A, the surety, hypothecated his property for the judgment debt of B and A sold away his equity of redemption, the creditor could not enforce the payment by sale of the hypothecated property under this section. 39 A. 225. It can be enforced only by a regular suit. 39 A. 225; 19 A. 247; 22 C. 859; 38 I.C. 130; 51 I.C. 736; 30 C. 1060; 2 A. 604 F.B.; 17 A. 99; 13 M. 1; 12 B. 411; 25 C.L.J. 354; 18 I.C. 900. A decree-holder is liable to the extent to which he has personally rendered himself liable in the manner provided for in the execution of decrees. 44 B. 34. This section has no application to cases where the instrument of suretyship creates no personal liability but only a charge on the property. 42 A. 158. In some cases it is held that property hypothecated can be proceeded against in execution under section 47. 41 M. 327; 30 C. 1060; 15 C. 497; 22 C. 25. The extent of the surety's liability is that indicated in the security bond. 38 I.C. 90; 99 P.W.R. 1918=45 I.C. 992; 13 W.R. 403. When the bond does not comply with the order of the court, the bond is not enforceable. 7 Bur. L.T. 5=23 I.C. 349. When the bond was to perform all decrees and orders passed in appeal, it was held that the obligation under the bond extended to the final decree passed in second appeal. 2 B. 654; 3 B. 204. Where a person has stood surety in the court of first instance, he is responsible for the amount for which he gave security and not for a larger amount found due on appeal. 12 B. 71; 10 B.H.C.R. 1. If the surety made himself liable for the payment of principal sum awarded in a Land Acquisition case, he cannot be made liable for interest and costs. 23 B. 478. A surety cannot be made liable for mesne profits if he gives security for costs of the Privy Council only. 15 M. 203. Where the surety has made himself liable only in the event of the judgment-debtor's property not being sufficiently available, the creditor cannot proceed against the surety unless the property of the judgment-debtor has been exhausted. 4 C. 331. If a surety gives security for the whole decretal amount and gets a bullock released from attachment, he is liable for the whole amount of the decree and the mere restoration of the bullock is not enough. 38 I.C. 90. When a surety gives security for the amount by which the sale proceeds fall short of decretal amount, the sale price must be taken to be the price realised after subtracting the sale expenses and poundage fees. 5 I.C. 139. A surety for the receiver is responsible only in respect of liability incurred by the Receiver in his capacity as a Receiver. 20 C.L.J. 123. A decree-holder is not bound to give the principal-debtor an opportunity of paying before taking proceedings against the surety. 20 I.C. 540=7 S.L.R. 19.

Notice.—A notice under the proviso to S. 145, C.P. Code, is a condition precedent to the validity of the order for execution against the surety. 2 R. 567=84 I.C. 998; 30 I.C. 517. A Court is not entitled to pay the surety's money in court to the judgment-creditor without notice to the surety and without a finding that the conditions of the bond had not been complied with. 34 I.C. 407. When a decree is transferred for execution to another court, the notice to the surety may be issued by such a court. 29 B. 29.

Suit.—This section is no bar to a regular suit against the surety. 36 B. 42; 6 N. W.P.H.C.R. 261; 51 C. 150; 30 C. 1060; 41 M. 327; 42 A. 158 (*contra* in 23 B. 478). This section lays down only an additional summary procedure by way of execution against the surety. The effect of inserting S. 47 in the section is not to deprive the claimant of the remedy by way of a regular suit. 19 C.W.N. 1085. A person who is not a party to the suit, and stands surety for the judgment-debtor for the due performance of a decree has no independent right to apply under S. 47 to cancel the security bond on some ground. His only remedy is by way of suit. 43 M. 325.

Appeal.—An appeal is allowed from an order under this section. 19 C.W.N. 1085 ; 12 B. 71 ; 8 W.R. 24 ; 9 B.H.C.R. 119 ; 24 I.C. 474=27 M.L.J. 112. The right of appeal is not restricted to sureties only. 26 I.C. 76. An order by a court requiring a surety for a receiver to pay up any money due under S. 145, C.P. Code, can be executed against the surety in the manner provided for the execution of decrees and an appeal lies from such order under S. 47, C.P. Code. 13 Bur. L.T. 91. A third party who has given security on behalf of a judgment-debtor for the due performance of a decree has no independent right of application under S. 47, C.P. Code, and cannot therefore apply to the executing court to cancel the security bond on the ground that it was obtained by fraud. His remedy is only by way of a suit. 43 M. 325. An order directing the surety to pay is not a decree except for the purposes of appeal only. 39 I.C. 678=3 Pat. L.W. 414. An order requiring a surety for a receiver to pay up money due under the surety bond is appealable. 59 I.C. 844=13 Bur. L.T. 91. An order directing the arrest of a surety is appealable. 27 I.C. 10=19 C.W.N. 1085. An appeal lies against the surety to enforce the security bond from an order passed in favour of the surety. 26 I.C. 76=(1914) M.W.N. 714. S. 145 makes a surety party to the suit only for a limited purpose, i.e., for appeal. 43 M. 325 ; 38 C. 754 ; 34 I.C. 247=10 Bur. L.T. 15 ; 1926 S. 105.

Revision.—Revision lies from an order discharging a surety. 41 B. 402.

Limitation.—The period of limitation for an application under S. 145 for enforcing the surety's liability is three years under Art. 182 (2). 44 B. 33.

EFFECT OF SECURITY ON THE LIABILITY OF THE JUDGMENT-DEBTOR.

—Furnishing of the security in no way detracts from the right of the decree-holder to enforce his decree against the judgment-debtor in any way it is thought fit, in accordance with law. The fact that a security is given does not take away any legal right which a decree-holder otherwise has. 3 Pat. L.J. 176=43 I.C. 454. At the same time, the decree-holder is not bound to exhaust the remedies against the judgment-debtor before proceeding in execution against the surety of such judgment-debtor. 7 S.L.R. 19=20 I.C. 540.

APPLICATION OF SECURITY MONEY.—The security money should be paid to the creditor and not forfeited to the Government. 39 C. 1018. Nor should it be given to the decree-holder over and above his decretal amount. 25 C.W.N. 36. Where the security offered by a surety for the judgment-debtor for his appearance or for filing an insolvency petition is forfeited owing to failure of the surety to produce the judgment-debtor, the sum so forfeited will be applied in satisfaction of the decree. 59 I.C. 778=25 C.W.N. 36.

LIABILITY OF SECRETARY OF STATE AS SURETY —The Secretary of State cannot be held liable under S. 145 as he is not made personally liable under the bond. 38 C. 754.

REGISTRATION.—A security bond given under O. 41, r. 5 (1) is compulsorily registrable under S. 59 of the T.P. Act and S. 17 of the Registration Act, if the property pledged is worth more than Rs. 100. 32 C. 494 ; 31 M. 330 ; 26 C. 222. A surety bond creating only a personal liability is not compulsorily registrable. 26 C. 222.

CHAPTER IV.

MODES OF EXECUTION.

Subject to such conditions and limitations as may be prescribed, the Court may on the application of the decree-holder order execution of the decree,

- (a) by delivery of any property specifically decreed ;
- (b) by attachment and sale or by sale without attachment of any property ;
- (c) by arrest and detention in civil prison ;
- (d) by appointing a receiver ; or
- (e) in such other manner as the nature of the relief granted may require. (S. 51).

SCOPE.—S. 51 provides only the modes in which the decree-holder may execute his decree. It has no discretion to deprive the decree-holder of his right to sell the mortgaged property under the decree. 67 I.O. 606=1922 P. 369.

RIGHT OF THE DECREE-HOLDER TO HAVE RECOURSE TO ALL THE REMEDIES.—Ordinarily a decree-holder is entitled to have recourse to all his remedies against the judgment-debtor and special circumstances should be proved in order to grant any exemption from the general liability. 32 I.C. 608. A decree may be executed simultaneously by attachment of the property and the arrest of the judgment-debtor. 7 B. 301.

BY SALE WITHOUT ATTACHMENT.—In the case of a decree for money when it is provided that if it is not paid by a certain date, specific moveable property should be sold, no attachment is necessary under O. 21, r. 30. 2 P. 768=73 I.C. 598. Where the decree stated that the amount should be payable in certain years and that on the failure to pay any instalment, the whole amount would become due and the mortgaged property would in the meantime remain hypothecated and that on the failure to pay the money created by the instalments the mortgaged property should be sold for realisation of the amount, it was not necessary that there should be an attachment before sale. 34 C. 886. When the shares of a Zamindar hypothecated by the lessee are to be sold for arrears of rent due to the Court of Wards, no attachment is necessary. 13 W.R. 173. Under the present law there is no necessity of any order of attachment of property in execution of a mortgage decree ; consequently, after the father's death, proceedings may be continued in execution against the son. 1923 P. 149.

IN SUCH OTHER MANNER AS THE NATURE OF THE RELIEF GRANTED MAY REQUIRE.—The words " otherwise as the case may be " mean that the mode of execution is to be adopted in each case to the nature of the particular relief sought to be enforced under the decree. 1 Ind. Jur. O. S. 125. Cl. (e) of S. 51, C. P. Code,

cannot be taken as authorising a Court to read into a decree a supplementary or alternative relief which is not there. 42 M.L.J. 956=16 L.W. 589. The reliefs claimed must be in the decree. 14 Bom. L.R. 861. The decree cannot be executed in any manner not granted by the decree. 6 M.L.T. 187.

EXECUTION OF DECREES GRANTING SEVERAL RELIEFS.—Where a decree grants reliefs of several kinds, such as a decree for possession and for costs there is nothing in the C.P. Code to prevent separate and successive applications for execution as regards each of them. 19 A. 98 F.B. ; 18 C. 515.

CHANGE OF LAW.—Execution applications should be dealt with under the law which is in force at the time execution is sought. 1 M. 403.

Appeal.—The fact that the execution sale took place and the application to set aside the sale on the ground of fraud was made before the new Code of 1908 came into force, does not make the order passed on the application, after the new Code came into force, subject to a second appeal under the provisions of the old Code. 17 C.W.N. 524=14 I.C. 53. A sale was held in execution under the old Code of 1882. The first application to set it aside on the ground of fraud was made and allowed by the first Court under the old Code. The order was set aside on appeal and the case was remanded under the old Code. On remand the application was dismissed by the first Court on June 12, 1909, i.e., after the new Code had come into operation. There was an appeal and the original order was once more set aside and the case again remanded. A second appeal was preferred against the remand order, *Held* that this order having been made under the new Code the appeal was incompetent. 16 C.W.N. 1015=15 I.C. 679. Act VIII of 1859 gave no right of appeal from an order setting aside a sale. Execution proceedings commenced under that Act ended in a sale after Act X of 1877 came into force. Such a sale was set aside. Although Act X of 1877 gave a right of appeal from such an order, it was held that the sale was governed by Act VIII of 1859; and no appeal lay from the order setting it aside. 3 B. 214. No right of appeal which has become vested in a litigant shall be affected by the C.P. Code. S. 154 of the Code of 1908 has neither expressly nor by necessary implication taken away any right of appeal which existed under the old Code of 1882. 21 M.L.J. 631 (20 C. 449 F.B., followed).

Sale.—When a sale is held the rights of the parties are fixed with reference to the state of the law at that time and any subsequent interpretation will not operate to affect the result of the sale. 42 I.C. 399=2 Pat. L.J. 725. In execution of a decree a house had been attached. Before the date of sale, S. 310 A had been enacted by Act V of 1894 (corresponding to O. 21, r. 90 of the new Code). The question was whether the judgment-debtor could apply under the new section to have the sale set aside. It was held that when Act V of 1894 came into force there was no purchaser in existence. The new law (S. 310-A) was passed before the purchase was made and the purchaser must take subject to its provisions. 18 M. 447. S. 310-A of the Code of 1882 (corresponding to O. 21, r. 90) did not confer a new and substantive right on the judgment-debtor. 22 C. 767 F.B.

S. 290 of the old Code (corresponding to S. 48, new Code) is a part of procedure and is subject to the rule that when an enactment deals with procedure only it applies to all actions pending as well as future. 3 M. 98.

Rateable distribution.—Attachment was effected by one judgment-creditor under Act VIII of 1859, but the sale was held after Act X of 1877 came into force. Another judgment-creditor applied for rateable distribution under S. 295 of Act X of 1877 (corresponding to S. 73 of the new Code); *held* that the first attaching creditor was entitled to have his decree fully satisfied out of the sale proceeds and no rateable distribution could be had. 3 B. 217.

Changes of law relating to procedure have a retrospective effect. 19 B. 204 ; 7 I. O. 11 ; 3 I. O. 603 ; 16 W. R. 540 ; 8 B. 511 ; 12 C. 583 ; 14 M. L. J. 340 ; 21 C. 940. But the provisions of Act VIII of 1859 were not applicable to an attachment made prior to that Act coming into operation. W. R. (1864) 224. The new Code applies so far as procedure is concerned to all cases which were pending at the time it came into force. 9 I. O. 815. Judgment-debtors imprisoned in satisfaction of decrees against them under the Code of 1859 were not entitled to be discharged on the coming into force of the Code of 1877 although they had undergone imprisonment for more than six months but less than two years. An Act should not be construed to operate retrospectively in the absence of express language or necessary implication to the contrary ; also where the Act is remedial and merely alters procedure without divesting any pre-existing right. 2 B. 148.

The effect of change of law is also given under various heads in various chapters where there have been changes.

Execution against surety.—Though before the passing of the amending Act VII of 1888 an application by the decree-holder for execution of the decree for costs against the surety was rejected on the ground that under the law as then stood, the security could not be enforced by means of execution and that the decree-holder must have recourse to a fresh suit against the surety, the decree-holder was after the passing of the Act VII of 1888 entitled to make a fresh application for execution against the surety under S. 6 of that Act. By Act VII of 1888 the previous statute was not repealed. The new provisions of the Act were those of procedure and not those which dealt with any right. The right of the decree-holder to recover his money was not affected, nor was the liability of the surety to pay the money. The only alteration was as to the mode in which to recover. 16 C. 323.

RULES OF EXECUTION DIFFERENT IN DIFFERENT DISTRICTS.—Where in different districts different modes of execution are prescribed and where the question is how a decree, passed in one, but of which execution is sought in another of such Districts, is to be executed, the executing Court must be guided by the rules in force in its own District. 31 B. 5. A decree which was obtained in Santhal Parganas and which could not have been executed by the arrest of the judgment-debtor if it had been executed by any of the Courts in Santhal Parganas, may be executed by the arrest of the judgment-debtor when it is transferred to any Court for execution outside the State. 10 I. O. 538. The mode of execution of a judgment is exclusively determined by the Court of process. 7 M. H. O. 285.

DECREE FOR PARTITION OF ESTATE OR SEPARATION OF SHARE.—Where the decree is for the partition of an undivided estate, assessed to the payment of revenue to the Government, or for the separate possession of a share of such an estate, the partition of the estate or the separation of the share shall be made by the Collector, or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with the law (if any) for the time being in force relating to the partition or the separate possession of shares, of such estates. S. 54.)

SCOPE.—This section applies only to cases where separate allotment of land revenue is asked for; otherwise the Civil Court has jurisdiction to execute the decree, 24 C. 725 F.B.; 7 C. 153; 10 C. 435; 15 C. 198; 23 C. 679, overruled in 24 C. 725 F.B. It applies to cases where a revenue paying estate has to be partitioned into several revenue paying estates. 16 C. 203; 45 I.O. 895=(1918) Pat. 130. This section does not apply where a decree for partition of a share in a portion of such an estate is to be executed. 6 A. 452; 8 B. 539. Raiyatwari holdings having been held not to be estates paying revenue to Government, a similar construction should be put on the provisions of S. 54, C.P. Code. 7 M. 382 F.B. The execution of a decree in an administrative suit cannot be carried out by directing the Collector under S. 54 to partition the estate. This section applies only where the decree is for partition of the land by what is known as metes and bounds, that is to say, when land held jointly and assessed to Government revenue as a whole is to be divided up into two or more plots or portions between the sharers, to be held by them, henceforth, separately. 8 S.L.R. 338=36 I.C. 385. S. 54 does not debar a Civil Court from delivering a portion of a revenue paying estate where a separate allotment of revenue is not asked for. 39 I.O. 173=(1917) Pat. 131. A Civil Court has jurisdiction to execute a decree for partition of a revenue paying estate, provided that it does not assume jurisdiction to partition the liability for the land revenue; so that in the event of a party applying to the Collector for partition of the land revenue after partition has been effected by the Civil Court, it would be open to the Collector to reconsider the allotment of the shares granted in the Civil Court proceedings. 45 I.O. 895=(1918) Pat. 134. A decree for possession against two out of many co-owners is not a decree under this section. 8 B. 539. Where the Civil Courts divided the lands of an estate, but did not take any action under S. 28 of the Partition Act V of 1897, held that the Collector is not bound officially to recognise what the Civil Court had done. 38 I.O. 593=1 Pat. L.W. 51.

Final order under Stamp Act.—A final order for effecting partition contemplated by S. 2 (15) of the Indian Stamp Act is analogous to a final order of the Collector under S. 54, C.P. Code, effecting a partition of an undivided estate paying revenue. 35 M. 26.

S. 54 applies in the case of an estate assessed to land revenue in one lump sum for the whole estate, and not to estates like the ordinary paddy holdings in Burma which are assessed at acre rates. 1926 Rang. 80=4 Bur. L.J. 260.

DECREE FOR PARTITION OR SEPARATE POSSESSION.—A decree for partition is a joint declaration of the rights of persons interested in the property sought to be partitioned and is, if properly drawn up in favour of each share-holder, or set of share-holders having a distinct share. 3 C. 551; 23 P. R. 1905; 20 A. 81; 22 M. 494; 12 A. 506; 22 M. 494. Where a decree merely states the shares of the plaintiffs in the immoveable property it is not a decree for partition. 2 M.L.T. 265; A.W.N. (1884) 215. The term partition in this section is not confined to the mere division of the lands into the requisite parts, but includes the delivery of the shares to their respective allottees. 11 B. 652. Possession must be given in execution after ascertaining what particular lands the decree-holders are entitled to under the decree. A.W.N. (1894) 118. Trees growing upon lands, the subject of partition, by the revenue authorities, go with the land and may be partitioned by them along with the land. 23 A. 91 F.B. A Court has power in executing a decree for partition of family property to order that any part of the property should remain joint. 3 C. 514. A decree for possession, against two out of many co-owners is not a decree for partition. 8 B. 539.

PRELIMINARY AND FINAL DECREES.—In a partition suit a preliminary decree is only made under the second clause of O. 20, r. 18 when the property to be partitioned is not property assessed to Government revenue. But when the property to

be partitioned is a property assessed to Government Revenue the Court passes at once a final decree and the rest of the proceedings are worked out in execution by the Collector. 29 I.C. 58=8 S.L.R. 335.

ESTATE.—The word "estate" is used in its ordinary significance and not in the restricted sense as used in the Batwara Law (Bengal Act VIII of 1876). 10 C. 435. Property held on raiyatwari tenure is not an estate, but permanently settled estates are within the meaning of this section. 7 M. 362 F.B. A contrary view is taken in 16 B. 528, where it is held that land held under a lease from Government for a fixed period is an estate. Isolated plots of land which fall short of being the share of a co-sharer in a mahal do not form an estate. 6 A. 452. Rent payable in the case of shrotriam village is revenue within the meaning of O. 21, r. 51.

CONTROL OVER COLLECTOR'S ACTION.—This section places the execution of the decree entirely in the hands of the Collector. 8 C.L.R. 307; 8 O.C. 59; 8 C. 649; 16 B. 528; 11 B. 662; 23 A. 291 F.B.; 15 B. 527; 73 P.R. 1889; A.W.N. (1880) 75. The Collector acts ministerially in executing such a decree, but a certain discretion is allowed to him and so long as he keeps within the bounds prescribed, the Civil Court has no right to replace his discretion by its own. 12 B. 371; 5 Bom. L.R. 648. The Collector cannot refuse to carry out the decree of the Court and the Court has a power to replace its own discretion. 16 B. 527. Where the Collector contravenes the decretal commands of the Civil Court or acts *ultra vires*, his action is subject to the control of the Court which passed the decree and sent it to him for execution. 28 B. 238; 14 B. 450; 29 I.C. 58=8 S.L.R. 335. The Civil Court has the judicial control of its decree, 12 B. 371; and has judicial power to hear objections to the partition made by the Collector. 19 M. 435. Under the Punjab Land Revenue Act, 1887, the proceedings of the revenue officers are subject to appeal and revision by his superior revenue authorities. 73 P.R. 1889. When the Collector has failed to execute the decree for a considerable time, it is competent for the Court to require him to carry through the execution proceedings pending before him. 29 I.C. 58=8 S.L.R. 335. A Civil Court is not competent to make a division of revenue paying land through a Commissioner appointed by it. No consent on the part of the parties can confer on a Civil Court jurisdiction, and objection to jurisdiction though taken at a late stage must prevail. 30 I.C. 209=2 O.L.J. 321. A partition of revenue paying land cannot be effected by a Civil Court under S. 54, C.P. Code. 16 B. 528. When the Collector acting under S. 54, C.P. Code, once effects a partition it is not competent to a Civil Court to entertain an application seeking to reopen the partition. 42 B. 689. In case of partition of lands, this section and S. 113, Bombay Revenue Code, Act V of 1879, place the execution of decrees entirely in the Collector's hands. 12 B. 371. A Civil Court which passed a decree for partition of a share of an undivided estate paying revenue to Government has no power under this section to order the Collector to effect the partition; but the decree-holder should in accordance with S. 69, Oudh Revenue Act, apply to the Collector to have his share partitioned. 8 O.C. 59. A decree of a Civil Court for partition is subject to S. 107 of the United Provinces Land Revenue Act, and cannot be fully executed until the decree-holder's name is recorded in the revenue papers. 23 A. 375.

EXECUTION IN CASE OF CROSS DECREES—(1) Where applications are made to a court for the execution of cross-decrees in separate suits for the payment of two sums of money

passed between the same parties and capable of execution at the same time by such Court, then—

- (a) if the two sums are equal, satisfaction shall be entered upon both decrees ; and
- (b) if the two sums are unequal, execution may be taken out only by the holder of the decree for the larger sum and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered on the decree for the larger sum as well as satisfaction on the decree for the smaller sum.

(2) This rule shall be deemed to apply when either party is an assignee of one of the decrees and as well in respect of judgment-debts due by the original assignor as in respect of judgment-debts due by the assignee himself.

(3) This rule shall not be deemed to apply unless—

- (a) The decree-holder in one of the suits in which the decrees have been made is the judgment-debtor in the other, and each party fills the same character in both suits, and
- (b) the sums due under the decrees are definite.

(4) The holder of a decree passed against several persons jointly and severally may treat it as a cross-decree in relation to a decree passed against him in favour of one or more of such persons.

Illustrations.

(a) *A holds a decree against B for Rs. 1,000 ; B holds a decree against A for the payment of Rs. 1,000 in case A fails to deliver certain goods at a future day. B cannot treat his decree as a cross-decree under this rule.*

(b) *A and B, co-plaintiffs, obtain a decree for Rs. 1,000 against C, and C obtains a decree for Rs. 1,000 against B. C cannot treat his decree, as a cross-decree under this rule.*

(c) *A obtains a decree against B for Rs. 1,000. C who is a trustee for B obtains a decree on behalf of B against A for Rs. 1,000. B cannot treat C's decree as a cross-decree under this rule.*

(d) *A, B, C, D and E are jointly and severally liable for Rs. 1,000 under a decree obtained by F. A obtains a decree for Rs. 100 against F singly and applies for execution to the Court in which the joint decree is being executed. F may treat his joint decree as a cross-decree under this rule. (O. 21, r. 18.)*

The provisions contained in O. 21, r. 18 shall apply to decrees for sale in enforcement of a mortgage or charge. (O. 21, r. 20.)

APPLICATIONS SHOULD HAVE BEEN MADE FOR EXECUTION OF BOTH THE DECREES.—If either of the decree-holders omits to apply for execution of his decree, the other decree-holder may take out execution of his decree for its full amount. 24 A. 481 ; 14 C. 18, 24 P.C. ; 32 M. 336 ; 21 I.C. 32=11 A.L.J. 763. An application for execution is necessary, but when the High Court, when affirming one of the decrees for rent, said that execution should not issue until the amount of mesne profits due under the decree in favour of the appellants had been ascertained, evidently the intention was that the decrees should be set off against each other and therefore set off was allowed although the decree-holders did not apply. 52 I.C. 746=(1919) Pat. 372.

THE CROSS-DECREES MAY BE FOR THE PAYMENT OF DEFINITE SUMS OF MONEY OR FOR THE SALE IN ENFORCEMENT OF A MORTGAGE OR CHARGE.—A decree for sale in enforcement of a mortgage or charge may be set off against a decree for payment of money. 29 M. 318 ; 33 A. 240. When one person has obtained a decree against another and the latter obtains a decree for mesne profits under S. 144, O.P. Code, against the former, the decrees are liable to be set off. 28 C.W.N. 988=84 I.C. 747.

BOTH THE DECREES MUST BE CAPABLE OF EXECUTION AT THE SAME TIME AND BY THE SAME COURT.—10 A. 188. Illustration (a) above. A decree passed by a Revenue Court under Act X of 1859 cannot be set off under O. 21, r. 18 against a decree passed by a Civil Court. 16 W.R. 303.

THE DECREE-HOLDER IN ONE SUIT MUST BE JUDGMENT-DEBTOR IN THE OTHER AND EACH PARTY SHALL FILL THE SAME CHARACTER IN BOTH THE SUITS.—A person against whom a decree foreclosing his rights to redeem a property from sale is passed in his character as a puisne mortgagee or an attaching creditor, is a judgment-debtor in that decree in a character different from the one in which he holds a decree made in his favour personally and which is enforceable against his judgment-debtor by the arrest of his person and attachment of his property. In the one case he has obtained a money-decree for costs in his individual and personal capacity, in the other he is not ordered to pay any sum of money in his individual and personal capacity but is only given an option to do so if he likes to save from sale some property in which he is interested. 38 A. 669. When the purchaser of a decree proceeds to execute it, the judgment-debtor cannot be allowed to set off on account of joint decrees obtained by himself and others against the purchaser subsequent to the sale of the purchased decree. Even where the joint decree is obtained by the judgment-debtor and others against the vendee of a decree before the date of the sale of the decree it cannot be set off against the purchaser. 15 W.R. 127. A decree against A cannot be set off against a decree held by A's son. 10 W.R. 450. A decree for or against a decree-holder or his assignee may be set off against a decree against or for the same decree-holder or his assignee respectively. (1914) M.W.N. 85=22 I.C. 73. A decree-holder may set off

his decree against a decree passed against him in favour of one of his judgment-debtors, who were jointly and severally liable to him under his decree. 39 I.O. 560 = 15 A.L.J. 327; 14 A. 339; 9 C. 479. A decree passed against A and B jointly for the principal sums and interest thereon up to the date of institution of the suit and against A alone for interest due from date of institution of the suit to the date of realisation is not a joint decree within the meaning of O. 21, r. 18 when B wants to set off certain amount paid by A in satisfaction of his decree. 2 Pat. L.J. 162 = 39 I.O. 662.

EQUITIES OF THE JUDGMENT-DEBTOR.—A party taking by assignment a decree obtained by A against B takes it subject to a set off on account of a cross-decree obtained by B against A. 10 W.R. F.B. 32; 19 W.R. 85; (But see 15 W.R. 127); 18 W.R. 442; 21 W.R. 141; 24 W.R. 299; 16 C. 619; 26 M. 428; 7 M.L.J. 227. (S. 49, O.P. Code). A got a decree against B and transferred it to C. B had a decree against C and sold it to D. An application was made by C to set off B's decree under O. 21, r. 18; held that S. 49 applied to the case and the equities had been rightly adjusted even though D was a *bona fide* purchaser. 4 Bur. L.T. 254 = 12 I.O. 205. A decree against the assignor in favour of A in a suit which was pending at the date of the assignment, and which had ripened into a decree before the assigned decree was fully executed, can be set off against the unexecuted portion of the assigned decree. 16 C. 619.

HOLDER OF THE DECREE FOR THE SMALLER AMOUNT.—A decree-holder for the smaller amount is not entitled to execute his decree, but is entitled to rights and priorities as if the decree for the larger amount was attached at his instance. 13 M.L.T. 227 = 17 I.O. 323.

DISCRETION OF THE COURT.—The provisions of the rule are imperative and give no discretion. Whether appealed or not the decrees might be set against one another and the larger of the two decrees only can be executed and that only for the difference. W.R. 1864 Mis. 1. But a party will not be allowed for the first time in second appeal to raise a contention that a decree sought to be set off against another decree could not be so set off. 1 L.W. 431.

EXECUTION IN CASE OF CROSS-CLAIMS UNDER THE SAME DECREE.—Where application is made to a Court for the execution of a decree under which two parties are entitled to recover sums of money from each other, then,—

- (a) if the two sums are equal, satisfaction for both shall be entered upon the decree; and
- (b) if the two sums are unequal, execution may be taken out only by the party entitled to the larger sum and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered upon the decree. (O. 21, r. 19.)

44 M.L.J. 590 = 72 I.O. 865.

The provisions of this rule shall apply to decrees for sale in enforcement of a mortgage or charge. (O. 21, r. 20.)

24 I.O. 376; 8 I.O. 835.

OBJECT AND SCOPE.—The object of O. 21, r. 19 is to prevent each side executing his decree in respect of sums due whether as costs or otherwise under the same decree, and there is nothing in it to prevent the plaintiff who holds a joint and several decree against two defendants (who under the decree are entitled individually to different costs which in the aggregate exceeded the amount due to the plaintiff) from taking out execution of the decree against one defendant alone for the balance due to him by both the defendants, until the other defendant makes the application in execution to recover the amount due to him by the plaintiff under the decree. 3 L.W. 267 = 34 I.O. 368; 16 A. 395. In an application for execution of a decree deducting the amounts due in respect of cross-claims under the decree, the Court should first ascertain what amounts were due from each party to the other and thereafter allow execution to proceed for the difference, making such order as is necessary for protecting the interests of the persons who had not joined in the application for execution. 44 I.O. 445. When a foreclosure decree provided for payment of money by plaintiff to defendant, O. 21, r. 19 does not prevent the defendant from executing the decree in his favour. 16 C.P.L.R. 73. When both the parties claim to be entitled to recover a sum from each other, execution can be taken out only for so much amount as remains after deducting the sum due to the judgment-debtor. 1923 Lah. 151.

CLAIMS IN A PRE-EMPTION DECREE.—When a pre-emption decree is passed in favour of the plaintiff with costs, the plaintiff may deposit the decretal amount deducting costs. 2 Lah. 294; 10 I.O. 454. A vendee against whom a decree for pre-emption is passed subject to a certain amount being deposited is not a person who can recover the purchase money from the plaintiff unless the latter chooses to deposit it. He cannot compel the plaintiff to exercise his rights under the decree for pre-emption and the case does not fall under O. 21, r. 19; hence costs awarded cannot be set off against the amount to be deposited as pre-emption money. 26 O.O. 346 = 74 I.C. 558.

COSTS.—The amount due to a party under a decree may be set-off against the costs due from him in the same decree. 23 M. 121; 12 W.R. 308.

DECREE UNDER O. 20, r. 20.—A decree is passed in a suit ordering that upon A paying to B Rs. 1,000 (mortgage-debt) on a day fixed by the Court, B shall deliver the property to A, and that, if such payment is not made as aforesaid, the property should be sold. At the same time A is awarded Rs. 100 as costs in the suit as against B. Here A cannot take out execution at all for the sum of Rs. 100 and B can take out execution for Rs. 900 only. 23 M. 121.

REFUND IN CASE OF WRONG EXECUTION.—When execution is taken out, the Court under its inherent powers can compel a refund of the sum taken in excess. 56 I.O. 753 = 24 O.W.N. 465.

CLAIM FOR THE SMALLER AMOUNT.—Though the opponents would be barred from recovering, by limitation, the larger sum awarded to them under the decree, the applicant for execution of the smaller sum could not avail of the circumstance to take out execution in a manner forbidden by O. 21, r. 19. 40 B. 60.

EXECUTION IN THE CASE OF A DECREE FOR EXECUTION OF A DOCUMENT OR ENDORSEMENT OF A NEGOTIABLE INSTRUMENT.—(1) Where a decree is for the execution of a document or for the endorsement of the negotiable instrument, and the judgment-debtor

neglects or refuses to obey the decree, the decree-holder may prepare a draft of the document or endorsement in accordance with the terms of the decree and deliver the same to the Court.

(2) The Court shall thereupon cause the draft to be served on the judgment-debtor, together with a notice requiring his objections, if any, to be made within such time as the Court fixes in this behalf.

(3) Where the judgment-debtor objects to the draft his objections shall be stated in writing within such time and the Court shall make such order approving or altering the draft as it thinks fit.

(4) The decree-holder shall deliver to the Court a copy of the draft with such alterations (if any) as the Court may have directed, upon the proper stamp-paper, if a stamp is required by the law for the time being in force; and the judge or such officer as may be appointed in this behalf shall execute the document so delivered.

(5) The execution of a document or the endorsement of a negotiable instrument under this rule may be in the following form, namely :—

“ C.D. Judge of the Court of—(or as the case may be) for A.B. in a suit by E.F. against A.B.”; and shall have the same effect as the execution of the document or the endorsement of the negotiable instrument by the party ordered to execute or endorse the same.

(6) The court, or such officer as it may appoint in this behalf shall cause the document to be registered if its registration is required by the law for the time being in force, or the decree-holder desires to have it registered and may make such order as it thinks fit as to the payment of the expenses of the registration. (O. 21, r. 34.)

SCOPE.—A decree directing the defendants to transfer half of the shares in the suit in favour of the plaintiff and to lodge the transfer together with the share certificate with the company for registration is enforceable under O. 21, r. 34. 41 I.C. 77. A decree directing the execution of a mortgage bond can be enforced under O. 21, r. 34.

25 C.W.N. 68=61 I.C. 535. A decree directed the judgment-debtor to execute a conveyance on payment of a sum of money by the decree-holder within one month; the decree-holder could not make the payment within the time extended by the Court; *held* that the judgment-debtor was not bound to execute the conveyance. 31 I.C. 457. Where in a suit for specific performance of an agreement, the decree directs execution of a conveyance and the defendant fails to comply with the decree the court shall proceed to exercise the power given by this rule. 10 O. 710; 18 B. 537. The decree-holder cannot move the court for execution of the document until the judgment-debtor has neglected or refused to obey a decree. 48 I.C. 188=14 N.L.R. 176. The Registrar of the High Court, if directed by the Court, can execute a conveyance. 16 C. 330. A decree directing the defendant to execute a conveyance of certain property may be executed under O. 21, r. 34. But the rights under the conveyance may be enforced by a separate suit. 12 C.L.J. 599. A compromise decree for execution of a conveyance may be executed under this rule. 10 O.W.N. 345; 61 I.C. 535=25 C.W.N. 68; 3 O.W.N. 30. When a document is executed by the court in a decree against a Hindu father, the liability of the son is not affected thereby. 6 O.L.J. 411.

EXECUTION OF CONVEYANCE OF PROPERTY SITUATE OUTSIDE BRITISH INDIA.—So far as the execution of a conveyance of the property situate outside British India is concerned the courts in British India cannot avail themselves of the procedure provided in O. 21, r. 34, O. P. Code, if the defendant disobeys the order. The only way in which the British Indian Courts can grant this relief is by granting a mandatory injunction directing the agent to execute a conveyance which may be enforced by attachment under O. 21, r. 52 of the Code. 29 M.L.J. 551=31 I.C. 216.

REGISTRATION.—A conveyance executed by the court under O. 21, r. 34 must be registered if it is compulsorily registrable under the Registration Act. 2 A. 392.

APPEAL.—An order under this rule is appealable under O. 43, r. 1 (i).

EXECUTION OF A DECREE FOR SPECIFIC PERFORMANCE OR AN INJUNCTION.—(1) When the party against whom a decree for specific performance of a contract or for an injunction has been passed has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced by his detention in the civil prison or by the attachment of his property or by both.

(2) Where the party against whom such a decree has been passed is a corporation, the decree may be enforced by the attachment of the property of the corporation, or with the leave of the court by the detention in the civil prison of the directors or other principal officers thereof or both attachment and detention.

(3) When any attachment mentioned above has remained in force for one year, if the judgment-debtor has

not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold, and out of the proceeds, the court may award to the decree-holder such compensation as it thinks fit and shall pay the balance (if any) to the judgment-debtor on his application.

(4) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where at the end of the one year from the date of the attachment no application to have the property sold has been made, or if made, has been refused, the attachment shall cease.

(5) Where such a decree as mentioned above has not been obeyed, the court may in lieu of or in addition to all or any of the processes aforesaid direct that the act required to be done may be done so far as practicable by the decree-holder or some other person appointed by the court at the cost of the judgment-debtor, and upon the act being done, the expenses incurred may be ascertained as if they were included in the decree.

Illustration.

A, a person of little substance, erects a building which renders uninhabitable a family mansion belonging to B. A in spite of his detention in prison and the attachment of his property declines to obey a decree, obtained against him by B, and directing him to remove the building. The Court is of opinion that no sum realisable by the sale of A's property would adequately compensate B for the depreciation in the value of his mansion. B may apply to the Court to remove the building and may recover the costs of such removal from A in the execution proceedings. (See O. 21, r. 32.)

LEGAL CHANGES.—(1) The words "for an injunction" in sub-rule (1) are substituted for the words "for the performance or abstention from any particular act" in S. 260 of the old Code. The effect of the change is that certain rulings under the old Code are no longer covered by the present Code. A party who has been ordered to file accounts and did not do so could be proceeded against under S. 260 of the old Code, 7 C. 654; 27 A. 374. (2) Sub-rules (2) and (5) are new. Under the old Code, it was not in the power of a Court to order its officers to personally carry out decrees for demolitions, etc. 18 W.R. 282; 8 C. 174; 26 B. 283; 33 C. 306; 1887 P.J. 74. Under the present Code it is competent to a Court to direct the act to be done by the decree-holder or by some person appointed by the Court at the cost of the decree-holder, 46 C. 103.

SCOPE—Decree for accounts.—Where the factum of principal and agent is established it is for the defendant to prove receipts and disbursements. If he fails to furnish the accounts within the time fixed the plaintiff may take advantage of the provisions of O. 21, r. 32, C.P. Code. 27 A. 374 under the old Code. This is no longer covered by the present rule, see legal changes, *supra*.

Endorsement of promissory note.—Where under a compromise decree, the defendant bound himself to endorse certain promissory note in plaintiff's favour on his failing to do so the proper course is to proceed under O. 21, r. 32, or r. 36 even where the promissory note had become barred. A separate suit was not maintainable under S. 47, C.P. Code. 24 M.L.T. 34=45 I.C. 689.

Injunction.—O. 21, r. 32 applies both to mandatory and prohibitory injunctions. A suit is not maintainable for enforcement of a prohibitory injunction embodied in a decree, but the remedy lies by way of execution under O. 21, r. 32. 46 C. 103. When a perpetual injunction is granted the decree may be enforced under this rule (on each successive breach of it) by an application made within three years of such breach under Art. 181 of the Limitation Act. 29 M. 314; 28 A. 300. A decree for a perpetual injunction restraining certain defendants from interfering with the performance of 'Arti' by the plaintiffs and other defendants can be executed in the manner provided by O. 21, r. 32. The Court is not justified in ordering the police to interfere in the matter, nor in ordering the appointment of a commissioner to see that the decree-holder performed without obstruction the duties appertaining to his office. 40 A. 648. It is not every order of a court directing a person to do a certain act that is an injunction. In its essence an injunction is a relief consequential upon an infringement of a legal right. An order to furnish account which was contained in a preliminary decree is not an injunction within the meaning of O. 21, r. 32. 3 Pat. L.J. 106=44 I.C. 737. ✓ A decree for putting down and removing a wall erected by a judgment-debtor on the decree-holder's wall must not be executed by the Court ordering its nazir to pull down the wall from the top of the decree-holder's wall. The Court should clearly point out to the decree-holder the manner in which the assistance of the court is to be sought. The judgment-debtor should be directed by notice to comply with the order in the decree within a certain time and on failure to comply with such order it may be enforced by imprisonment or attachment of property. 8 C. 174. The provisions of O. 21, r. 32 (5) apply only when a decree for an injunction has not been obeyed. Consequently where a decree for the demolition of a wall has been executed and the wall demolished accordingly, the decree cannot be put in execution again so as to require the demolition of a new wall subsequently erected. The remedy of a decree-holder is by a fresh suit. 5 L. L.J. 70; 59 I.C. 594. Where a decree purports to grant a perpetual injunction to keep a door closed by using the words (*hamesha ke waste*) and the judgment-debtor opens another door, the decree-holder can execute his decree and is not bound to bring a fresh suit. 12 A.L.J. 347. A judgment-debtor who does not voluntarily satisfy a decree does not commit an actionable wrong so as to render him to compensation for damages. The decree-holder can proceed by way of execution. 45 I.C. 689=(1918) M.W. N. 333.

SUCCESSIVE REMEDIES.—The provisions of this rule give a means of punishing disobedience and a decree-holder is not prevented from taking further steps if he has received compensation for an injury done. 1 A.L.J. 431. A Court cannot compel a decree-holder to part with his legal rights and accept a compensation against his will. 17 B. 771.

SALE UNDER O. 21, R. 32.—The rule is a highly penal one, and must be construed strictly. When a sale is ordered under this rule the following conditions must exist.—(i) a valid original attachment; (ii) application, within one year of that attachment, by the decree-holder for sale; and (iii) lapse of one year from date of attachment.

Therefore, where an order of attachment was made on 27th June 1908 and was carried out on 20th July 1909, and no application for sale was made by 20th July 1909, it was held that the attachment had ceased to exist and the order for sale was therefore set aside. 69 P.R. 1911=170 P.L.R. 1911=10 I.C. 341.

OPPORTUNITY TO OBEY THE DECREE.—The Court is to see that the judgment-debtor has had an opportunity of obeying the decree; and it is not obligatory upon the court to serve a notice upon him calling upon him to obey the decree. 33 C. 306. Where no opportunity is offered to the judgment-debtor, the application for execution must be dismissed. 21 C. 784 P.C. Before a decree for an injunction may be enforced by imprisonment or attachment it must be established that the judgment-debtor had had an opportunity of obeying the injunction. 9 Bom. L.R. 301; 7 B.H.C.R. 122.

DETENTION.—Detention in prison of a person guilty of a breach of an injunction not only enforces the decree so long as the offender is in prison, but also contributes to its enforcement in future by putting the offender in fear. Even a temporary disobedience of the order can be punished and any subsequent obedience is no bar to its execution. 19 M.L.T. 132=32 I.C. 698.

ORDERING SECURITY.—The Court has no power to order security bond for the obedience of a decree for an injunction under O. 21, r. 32. 19 M.L.T. 132=32 I.C. 698.

LIMITATION.—An application to a court to exercise its powers under O. 21, r. 32 is an application for the execution of the decree and as regards limitation is governed by Art. 182 of the Limitation Act. 5 Bur. L.T. 116=15 I.C. 945; 23 A. 465. According to the Madras and Calcutta High Courts Art. 181 is applicable. 29 M. 314; 46 C. 103.

DECREE FOR RESTITUTION OF CONJUGAL RIGHTS.—(1) Where the party against whom a decree for restitution of conjugal rights has been passed has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced by the attachment of his property.

(2) Where the attachment under (1) has remained in force for one year, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold, and out of the proceeds the court may award to the decree-holder such compensation as it thinks fit and shall pay the balance (if any) to the judgment-debtor on his application.

(3) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where at the end of one year from the date of attachment, no application to have the attached property sold, has been made, or if made, has been refused, the attachment shall cease. (See O. 21, r. 32.)

DISCRETION OF COURT IN EXECUTING DECREES FOR RESTITUTION OF CONJUGAL RIGHTS.—(1) Notwithstanding anything in rule 32, the Court, either at the time of passing the decree against a husband for the restitution of conjugal rights, or at any time afterwards may order that the decree shall be executed in the manner provided in this rule.

(2) Where the Court has made an order under sub-rule (1) it may order that in the event of the decree not being obeyed within such period as may be fixed in this behalf, the judgment-debtor shall make to the decree-holder such periodical payments as may be just, and if it thinks fit require that the judgment-debtor shall, to its satisfaction, secure to the decree-holder such periodical payments.

(3) The Court may from time to time vary or modify any order made under sub-rule (2) for the periodical payment of money either by altering the times of payment or by increasing or diminishing the amount, or any part of the money ordered to be paid, and again revive the same either wholly or in part as it may think just.

(4) Any money ordered to be paid under this rule may be recovered as though it were payable under a decree for the payment of money. (See O. 21, r. 33.)

LEGAL CHANGES.—O. 21, rr. 32 and 33 have been amended by the Code of O.P. Amendment Act XXIX of 1929. (i) In rule 32 the words "in the case of a decree for restitution of conjugal rights by the attachment of his property, or in the case of a decree for the specific performance of a contract or for an injunction" have been inserted after the word "enforced". (ii) In rule 33, after the words "passing a decree" the words "against the husband" have been inserted. (iii) For the words "shall not be executed by detention in prison" the words "shall be executed in the manner provided in this rule" have been substituted. The effect of change in law is that a decree for restitution of conjugal rights cannot be executed by imprisonment of the judgment-debtor and the Courts now have no discretion in the matter.

FORM OF THE DECREE.—A decree for restitution of conjugal rights should be passed in terms that the husband is entitled to conjugal rights, that his wife do return to live with him and that her parents do not interfere in any manner to prevent her doing so. 2 Agra 111.

WILFUL FAILURE TO OBEY THE DECREE.—When a decree was passed against a mother to refrain from preventing her daughter returning to her husband and the mother permitted her daughter who was of age to reside in her house it was held that such permission did not amount to wilful failure to obey the decree. 1 A. 501.

DECREE AGAINST DEFENDANTS OTHER THAN THE WIFE OR HUSBAND.—Where the wife is a minor, her parents can be directed to hand her over to the husband and in case of their default or failure to show sufficient cause therefor, execution may be had against their persons as well as property, 23 I.O. 829. Where any third person prevents the wife from returning to her husband a decree for injunction may be obtained against him which may be enforced in case of disobedience by the imprisonment of the defendant or by the attachment of his property or both by imprisonment and attachment of property under O. 21, r. 32.

EFFECT OF DECREE FOR CONJUGAL RIGHTS.—Where a decree for restitution of conjugal rights has been disobeyed the wife is not entitled to make a claim for maintenance against her husband, 73 I.C. 716.

EXECUTION OF DECREE AGAINST FIRM.—(1) Where a decree has been passed against a firm, execution may be granted—

- (a) against any property of the partnership ;
- (b) against any person who has appeared in his own name under rule 6 or rule 7 of Order 30 or who has admitted on the pleadings that he is or has been adjudged to be a partner ;
- (c) against any person who has been individually served as a partner with a summons and has failed to appear :

Provided that nothing in this sub-rule shall be deemed to limit or otherwise affect the provisions of section 247 of the Indian Contract Act, 1872.

(2) Where the decree-holder claims to be entitled to cause the decree to be executed against any person other than such a person as is referred to in sub-rule (1), clauses (b) and (c) as being a partner in the firm, he may apply to the Court which passed the decree for leave ; and where the liability is not disputed, such Court may grant such leave ; or where such liability is disputed may order that the liability of such person be tried and determined in any manner in which any issue in a suit may be tried and determined.

(3) Where the liability of any person has been tried and determined under sub-rule (2), the order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.

(4) Save as against any property of the partnership, a decree against a firm shall not release, render liable, or otherwise affect any partner therein unless he has been served with a summons to appear and answer. (See O. 21, r. 50.)

SCOPE.—This rule was newly added in the O.P. Code of 1908. It is a reproduction of O. 48, r. 8 of the English Rules. This rule applies only in the case of decrees against firms. It deals with the liability of the firm property as well as the personal liability of the partner in the firm which may be noted below separately. A special procedure is prescribed to enforce the liability of those partners who do not come under sub-ol. (1). 91 I.C. 824; 89 I.C. 138=26 P.L.R. 494; 89 I.C. 401.

LIABILITY OF PROPERTY OF THE PARTNERSHIP.—Under the Civil Procedure Code as well as under the English Law where a judgment is against a firm, execution may issue against any property of the partnership so far as partners who are not individually served and those who have not appeared are concerned. 86 M. 414. If the property attached is found to be partnership property, it will not be necessary for the decree-holder to obtain leave before attaching it under O. 21, r. 50 (1), O.P. Code. O. 21, r. 50 (2) applies only to cases in which members of partnership who have not been impleaded as such are sought to be arrested in execution of a decree against the firm. (1915) M.W.N. 180=28 I.C. 260.

PERSONAL LIABILITY—O. 30, r. 6.—Where persons are served as partners in the name of their firm they shall appear individually in their own names, but all subsequent pleadings shall, nevertheless continue in the name of the firm.

O. 30, r. 7.—Where a summons is served in the manner provided by r. 3 upon a person having the control or management of the partnership business, no appearance by him shall be necessary unless he is a partner of the firm sued.

Any person who has appeared in his own name under r. 6 or r. 7 mentioned above and not in the capacity of a representative or manager of the firm is personally liable for the decree against the firm; and any person who has admitted by his pleadings that he is a partner or who has been adjudged, on his denial, to be a partner in the firm, is liable personally. The liability of such persons is not limited to the partnership property, but extends to their other property and their person. Any person who has been individually served as a partner in a suit against the firm with a summons and who has failed to appear is personally liable under such a decree. 19 C.W.N. 1068=26 I.C. 866. The liability of any persons other than those mentioned in r. 50, ols. (b) and (c) is to be determined by the special procedure mentioned in sub ol. (2) of the rule. The decree-holder shall apply to the Court that passed the decree for leave to execute the decree against such person. Such Court may grant leave where the liability is not disputed. Where such liability is disputed the Court may order that the liability of such person, may be tried and determined as if such liability were a point in issue between the parties. 1 K.B. 854. Where a decree is against a firm, execution may issue only against the property of the partnership, so far as partners who are not individually served and those who have not appeared are concerned.

36 M. 414 ; 80 I.C. 779=26 Bom. L.R. 388 ; 91 I.C. 824=1925 L. 379 ; 89 I.C. 138 ; 89 I.C. 401 ; 86 I.C. 435=18 S.L.R. 176.

SUB-RULE (2).—No order can be made against a former partner who has to the plaintiff's knowledge left the firm before the suit. (1894) 1 Q.B. 792. Sub-r. (2) is only applicable in the absence of conditions in sub-r. (1). 26 I.C. 866=19 C.W. N. 1008 ; 28 I.C. 260. A plaintiff who has obtained a decree against a firm can apply for leave to issue execution against any person other than such person as is referred to *ols.* (b) and (c) of sub-r. (1) provided he had not to the knowledge of the plaintiff left the firm before the issue of summons. This sub-rule applies only when the decree is executed against partners not impleaded in the suit as defendants. 28 I.C. 260=(1915) M.W.N. 180. Execution can issue against the representative of a deceased partner under this sub-rule. 68 I.C. 627=24 Bom. L.R. 1037. But the partner must be living at the date of the decree, otherwise the sub-rule does not apply to the estate of the deceased in the hands of the legal representative. 87 I.C. 992=1925 S. 289. No special leave is required to execute a decree against a person who has either appeared in his own name under O. 30, rr. 6 and 7 or who has admitted in the pleadings that he is a partner or who has been served as a partner with the summons. 1926 S. 51=89 I.C. 401.

SUB-RULE (4).—The meaning of *cl.* (4) of the rule is that the decree against a firm as such will not affect a partner who has not been served with a summons to appear and answer in so far as his other property is concerned. O. 21, r. 50 (2) is wide enough to cover the case of a deceased partner. R. 50 (4) is really intended to make clear the implication of sub-r. (1). It does not in any sense affect the provisions of sub-r. (2). 1923 B. 66=68 I.C. 627. A notice under sub-r. (4) is imperative to make the partner liable. 1926 O. 271=91 I.C. 824.

COURT WHICH PASSED THE DECREE.—In this rule this expression includes the Court to which a decree is transferred for execution. 43 A. 394 ; 86 I.C. 1013. Under the Rangoon High Court Original Side Rules, the Deputy Registrar has power to decide applications for leave to execute under O. 21, r. 50 (2). 1925 R. 317=91 I.C. 778.

COURT-FEES ON APPEAL.—An order under this rule determining the liability of a partner of a firm has the force of a decree and an appeal should be stamped *ad valorem* under Sch. I, Art. 1 of the Court Fees Act. 10 Bur. L.T. 42.

DECREE FOR PAYMENT OF MONEY.—Every decree for payment of money, including a decree for the payment of money as the alternative to some other relief may be executed by the detention in the civil prison of the judgment-debtor or by the attachment and sale of his property or by both. (O. 21, r. 30.)

OPTION OF THE CREDITOR.—The creditor has an option to enforce his decree either against the person or the property of the debtor and the fact that the decree is an *ex-parte* one makes no difference. 4 C. 583. See *Simultaneous Execution, supra*.

MONEY-DECREE.—Where the decree directed that the decree-holder was to get a particular allowance from the judgment-debtor and which was made a charge on a certain property, such a decree is to be executed as provided in O. 21, r. 30, 1 Pat. L.T. 647=59 I.C. 282. Where a decree upon an hypothecation bond orders satisfaction

from the property and also from the person of the judgment-debtor and contains no condition that execution shall be enforced against the property alone, it is open to the decree-holder to enforce his decree against the judgment-debtor's person or property. 9 A. 484.

Instalment decrees.—A compromise decree providing payment of money by instalments can be realised by executing the decree for each instalment falling due and not by a separate suit. 32 I.C. 693.

This rule provides for cases of decrees providing for payment of money only and not affecting specific immoveable property. 73 I.C. 598=2 Pat. 768. A decree for dissolution of partnership is for the purposes of execution a money decree. 27 B. 556. A decree upon a sale on a mortgage is not a decree for money. 28 A. 771; 6 C.W.N. 5; 4 C.W.N. 8.N. 35; 2 O.L.J. 499. See also other cases cited. A decree for rent which is on the face of it a decree for a sum of money without charging the tenure with any lien or charge of any kind may be executed as a decree for the payment of money. 17 C. 301; 8 C.W.N. 575. A decree for payment of maintenance to be paid at a certain rate per month stands on the same footing as a decree ordering payment by instalment and may be executed as each instalment falls due. 15 W.R. 128; 9 O. 535. An order under the Land Acquisition Act directing a party to refund the amount of compensation paid to him, may be executed under O. 21, r. 30. 32 C. 921.

APPOINTMENT OF RECEIVER.—A receiver may legally be appointed under O. 40, r. 1 in execution of a money decree. 11 N.L.R. 113.

DECREE FOR SPECIFIC MOVEABLE PROPERTY.—(1) Where the decree is for any specific moveable, or for any share in a specific moveable, it may be executed by the seizure, if practicable, of the moveable or share and by the delivery thereof to the party to whom it has been adjudged or to such person as he appoints to receive delivery on his behalf, or by the detention in the civil prison of the judgment-debtor or by the attachment of his property or by both.

(2) Where any attachment under sub-r. (1) has remained in force for six months, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold and out of the proceeds the Court may award to the decree-holder, in cases when any amount has been fixed by the decree to be paid as an alternative to delivery of moveable property, such amount, and, in other cases, such compensation as it thinks fit and shall pay the balance (if any) to the judgment-debtor on his application.

(3) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound

to pay, or where at the end of six months from the date of the attachment, no application, to have the property sold, has been made, or if made has been refused, the attachment shall cease. (See O. 21, r. 31.)

SCOPE.—To enforce the decree obtained, by the stringent methods provided in O. 21, r. 31, the plaintiff should allege and prove facts necessary to bring the case under S. 11, Specific Relief Act. 39 M. 1 F.B. The words "or for the recovery of a wife" have been omitted in the present Code. This rule does not apply to a debt. 37 M. 381; 22 W.R. 36. Where the property is not in the possession of the judgment-debtor the provisions of the rule do not apply. 1 C.W.N. 170.

DECREE FOR SPECIFIC MOVEABLES.—A decree for possession of jewels as set out in the plaint is such a decree. 64 P.R. 1890. A decree for possession of three-fourths of an estate, consisting of moveable as well as immoveable property is a decree for specific moveable property. 60 P.W.R. 1908.

EXECUTION OF DECREE FOR IMMOVEABLE PROPERTY.—(1) Where a decree is for the delivery of any immoveable property, possession thereof shall be delivered to the party to whom it has been adjudged or to such person as he may appoint to receive delivery on his behalf, and if necessary, by removing any person bound by the decree who refuses to vacate the property.

(2) Where a decree is for the joint possession of immoveable property, such possession shall be delivered by affixing a copy of the warrant in some conspicuous place on the property and proclaiming by beat of drum or other customary mode, at some convenient place, the substance of the decree.

(3) Where possession of any building or enclosure is to be delivered and the person in possession being bound by the decree does not afford free access, the Court through its officers, may, after giving a reasonable warning and facility to any woman not appearing in public, according to the customs of the country, to withdraw, remove or open any lock or bolt or break open any door, or do any other act necessary for putting the decree-holder in possession. (See O. 21, r. 35).

Where a decree is for the delivery of any immoveable property in the occupancy of a tenant or other person entitled

to occupy the same and not bound by the decree to relinquish such occupancy, the Court shall order delivery to be made by affixing a copy of the warrant in some conspicuous place on the property and proclaiming to the occupant by beat of drum or other customary mode at some convenient place, the substance of the decree in regard to the property. (O. 21, r. 36.)

ACCESSORIES TO THE PROPERTY.—In execution of a decree for possession of immoveable property, the holder of a decree is entitled to the account books and other documents relating to its enjoyment and management. These are regarded as accessories to the estate and claimable by him to whom it has been awarded, at least in so far as they are necessary to his effectual and proper enjoyment. 11 B. 485.

DELIVERY OF POSSESSION TO AGENT.—Delivery of possession under these rules may be made to any person orally authorised by the decree-holder to take possession, even though he does not hold a power-of-attorney from the decree-holder. 40 I.O. 689=13 N.L.R. 87.

SUB-RULES (2) AND (3) are new in the present Code.

ANY PERSON BOUND BY THE DECREE.—This expression includes persons taking from the judgment-debtor and affected by the rule of *lis pendens*.

DELIVERY OF POSSESSION AND CRIMINAL PROCEEDINGS.—Delivery of possession under O. 21, r. 36, should be considered sufficient in a proceeding under S. 145 of the Criminal Procedure Code. 26 O. 625; 71 I.O. 999=3 Pat. L.T. 628.

EXECUTION OF MORTGAGE DECREES.—When a mortgage decree directed that the decree-holder should bring to sale the mortgaged property in the first instance and allowed him to proceed against the other properties only for the balance of the decretal amount, if any, the decree-holder could not abandon his claim against the mortgaged property and proceed against the other properties in the first instance. 26 M. L.J. 83=21 I.O. 782; 3 M.L.T. 336. The decree in a suit upon a hypothecation bond which only provides for its enforcement against the hypothecated property could not be executed against the person or other property of the judgment-debtor, although an order for costs may be so executed. 10 A. 127; 5 A. 352; 11 B. 537 (*contra* in 4 A. 493, where execution was allowed on principles of equity). But where a decree ordered sale of the hypothecated property and at the same time allowed him to proceed against the judgment-debtor personally, the decree-holder is entitled to enforce his decree at his option against the person or the property of the judgment-debtor. He cannot be compelled to go against the property before seeking his remedy against the person except when the Court is forced to exercise its equitable jurisdiction, so as to compel him for the purpose of preventing a fraud being perpetrated on the judgment-debtor. 9 A. 484; 8 O. 687; 15 A. 334; 13 A. 356; 13 A. 360; 14 A. 513; 7 O. 748; 4 A. 497. S. 90, T.P. Act, lays down that the decree must first be satisfied by sale of the mortgaged property and if it does not fetch enough to pay the charge, interest and costs, then the decree-holder may ask the Court for a decree for the balance if it is recoverable personally from the defendant. 10 A. 632. The further decree contemplated by S. 90, T.P. Act, is in the same suit and not in a separate suit. 11 A. 486; 16 C. 423; 21 O. 26; 15 A. 331; 20 A. 386; 26 O. 166. The decree-holder must proceed for the realisation of his money against that property

which is allotted to his mortgagor on partition and not against the property actually mortgaged. 20 C. 533. Where properties within Calcutta were mortgaged to first mortgagee and those together with other properties outside Calcutta were mortgaged to a subsequent mortgagee, *held* that the subsequent mortgagee was entitled to proceed against the properties outside Calcutta to realise any balance of mortgage-money that might remain due to him in the same proceedings. 24 C. 190. Future interest awarded by a decree is not to be considered as a charge on the mortgaged property comprised in the decree. 16 A. 269. A mortgagee-decree-holder is entitled to proceed against the mortgaged properties in such order as he might think best in his own interest. 21 A.L.J. 818=83 I.C. 832. A decree-holder is entitled to have all the properties mortgaged to him put up for sale but it is entirely in the discretion of the Court to direct in which order the properties should be sold. All the properties must be advertised for sale and when they are actually brought into execution and become subject to a sale it would be then for the Court to decide on just and equitable principles which property ought to be first sold. 2 Pat L.R. 242=84 I.C. 203. In the absence of a direction in the mortgage decree the decree-holder is primarily entitled to sell the properties in the order he thinks best in order to satisfy his decree, but the Court ultimately has the right to determine the order of the properties to be sold according to the equities affecting the parties. 78 I.C. 609.

Decree for redemption.—There is no provision in the C. P. Code under which an application for possession under a decree for redemption could be made. Such an application by the mortgagor on payment of the amount due is not in execution of the decree. Such an application should not be in form prescribed by O. 21, r. 11 and it should be filed on the record in the suit and not in the execution proceedings. 4 L.B. R. 83 ; 22 C. 924 ; 29 C. 651 ; 8 C.W.N. 102.

When a mortgage decree passed on an award left it to the choice of the plaintiff to proceed first either against the person or against the mortgaged properties it was held that the judgment-debtor had no right to claim that the mortgagee should realise his security first, the mortgagee is at liberty to proceed in execution under the same decree either against the secured or unsecured properties. 5 S.L.R. 71. Hypothecation of property in bonds on which a decree in favour of the party so secured is made gives such party a right to the application of the hypothecated property or its sale proceeds to the satisfaction of the claim decreed in his favour, although he could not, after the sale of the property in execution of another's decree have caused it to be re-sold in satisfaction of his own without bringing a fresh suit and obtaining a decree for that purpose. 1 N.W.P. 27. A mortgage decree cannot be executed against some of the owners of the equity of redemption. 47 I.C. 907. The purchaser of property, sold subject to incumbrances thereon at a sale under Bengal Act VII of 1868, who subsequently purchased a decree passed prior to such sale in a suit upon a mortgage of the property which was in addition to being a charge on the property, also personal against the judgment-debtor-mortgagor, was held not entitled to execute such decrees against the surplus sale proceeds notwithstanding the abandonments of his lien on the property. 6 C. 711.

ATTACHMENT BUT NO SALE.—An attachment can issue in respect of property even though it might not be liable to sale without instituting a suit for sale. 22 C. 813 ; 25 C. 262 ; 31 M. 33. Property must be attached before being sold in execution of a decree *with certain exceptions*. 1 Ind. Jur. O. S. 125.

TEMPORARY ALIENATION.—The C.P. Code does not confer upon the executing Court a power of temporary alienation of property of the judgment-debtor to the decree-holder or any other person. Such a power can be exercised only under S. 72 or S. 68, C.P. Code, along with Sec. III by the Collector. 43 I.C. 356 ; 4 L.L.J. 476. A Court can in execution of a decree order a temporary alienation of the land

belonging to a member of an agricultural tribe and S. 16 of the Punjab Alienation of Land Act, 1900, which prohibits sale does not prohibit a temporary alienation. 1 L. 192 F.B. ; 4 P.R. 1903 (3 P.R. 1917, not followed). Where the Collector finds that the sale of land in execution would be undesirable and that the decree can be satisfied, within a reasonable time by a temporary alienation of the land, he may place what he considers proper, before the executing Court, which may after hearing the parties decide whether effect should be given to such arrangements or not. But such an arrangement cannot be treated as a final settlement of the decree, till the Court accepts it and authorises the Collector to give effect to it. 114 P.R. 1886 ; 43 I.C. 356. The Insolvency Court or the Receiver appointed by such Court can effect a mortgage of the insolvent's land who is an agriculturist for a term of 20 years only and that also under the terms of the Punjab Land Alienation Act. The procedure for such a Court or Receiver is the same as is prescribed for the Civil Courts. 2 L. 78.

DECREE FOR PARTITION.—It is not competent to a Court in executing a decree for partition to erect a wall between the divided parts. The execution is complete when the parties are put in possession of their respective lots. A decree for an undivided share of certain lands after removal of the trees planted thereon, cannot entitle the decree-holder to remove the trees from a larger area than that to which he was entitled. 16 A. 452. It is not open to the Court in execution of a decree for partition of family property to order that any part of the property should remain joint unless all the co-parceners who are parties to the suit agree to such an order being passed. 3 C. 514. In the execution of a partition decree when the judgment-debtor had produced before the Court certain property and there was a surety as well for the performance of the decree, the property produced must first be applied towards the satisfaction of the decree, and if the decree-holder did not obtain satisfaction in this way, the execution should proceed against the surety. 19 B. 578.

Limitation.—For purposes of limitation execution proceedings in a partition decree by either of the two share-holders are only taken on behalf of both. 3 C. 551 ; 9 C. 568.

DECREE FOR MAINTENANCE.—A decree for arrears of maintenance and future maintenance can be executed against the person of the judgment-debtor when the property hypothecated is exhausted. A separate suit is not necessary for the purpose, when the charge created was merely a lien created by the decree. 2 Pat. 796 = 74 I.C. 867. When a charge is created in a decree for maintenance, the enforcement of the same can only be effected by instituting a suit under S. 67 of the T.P. Act. 22 I.C. 903 ; 22 C. 859.

EXECUTION OF RENT DECREE.—Where the decree was an ordinary decree for rent, and no reference whatever was made in it to the kabuliāt or to the terms thereof and it does not appear that the kabuliāt was ever filed in the rent suit, it is not open to the judgment-debtor to go behind the decree and to insist that the terms of the kabuliāt should regulate the rights and the liabilities of the parties as regards the mode in which the decree should be realised. 14 C. 14. A landlord obtaining a decree against his tenant which is on the face of it a decree for a sum of money without charging the tenure with any lien or charge of any kind is entitled to pursue his remedy against properties other than the tenure itself. 17 C. 301 ; 15 C. 492. Where a decree for arrears of rent does not restrict the decree-holder to execute the decree in any particular manner, the decree may be executed in any way the decree-holder chooses though there are restrictions in the pattā which have not been embodied in the decree. 62 I.C. 711 (C.). S. 65 of the B.T. Act VIII of 1885 has been held not to limit in any way the personal liability of the tenant for rent. 26 C. 103.

DECREE AGAINST MILITARY OFFICERS.—A decree passed against a Military Officer in view of the terms of the Military Act, 1877, cannot be executed otherwise than in accordance with its terms. Where a decree directed that the judgment-creditor should be paid by the stoppage of half the Officer's pay for the current or future months execution could be taken by attachment of his property. 1 A. 730. The pay of a Military Officer cannot be attached in the hands of the pay-master in execution of a decree, when the decree makes no provision for its stoppage. 7 N.W.P. 331.

AN AWARD UNDER THE ARBITRATION ACT, 1899.—An award passed under the Indian Arbitration Act can be enforced as if it were a decree of the Court (S. 15); but the stay of its execution cannot be ordered under O. 21, r. 29, C.P. Code. 8 I.O. 179.

EXECUTION BY GOVERNMENT FOR COURT-FEES—O. 33, r. 10.—When the plaintiff succeeds in the suit (pauper suit) the Court shall calculate the amount of Court-fees which would have been paid by the plaintiff, if he had not been permitted to sue as a pauper. Such amount shall be recoverable by the Government from any party ordered by the decree to pay the same and shall be a first charge on the subject-matter of the suit.

O. 33, r. 11.—When the plaintiff fails in the suit or is dispaupered or where the suit is withdrawn or dismissed the Court shall order the plaintiff or any person added as a co-plaintiff to the suit, to pay the Court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper.

O. 33, r. 12.—The Government shall have the right at any time to apply to the Court to make an order for the payment of the Court-fees under r. 10 or r. 11.

O. 33, r. 13.—All matters arising between the Government and any party to the suit under r. 10, r. 11 or r. 12 shall be deemed to be questions arising between the parties to the suit within the meaning of S. 47.

O. 33, r. 14.—When an order is made under r. 10, r. 11 or r. 12, the court shall forthwith cause a copy of the decree to be forwarded to the Collector.

MODE OF REALISATION.—If the plaintiff succeeds, the amount of Court-fees is declared by operation of law to be a first charge on the subject-matter of the suit and such amount is recoverable in the same manner as costs of a suit are recoverable. 18

A. 419. A separate suit does not lie to recover the amount of Court-fees. 50 I.O. 315. These rules do not justify the Court in selling a decree in *forma pauperis* upon the application of the Collector. 20 C. 111. The Government has a first charge on the subject-matter of the suit decreed in respect of the Court-fees due to it. 9 A. 64; 25 M. 738. Where in a pauper suit, the amount awarded to the plaintiff falls short of the amount payable by him to the defendant on account of costs, he cannot be said to have succeeded within the meaning of this rule so as to entitle the Government to any charge on the amount decreed. 69 I.O. 743.

EXECUTION OF A DECREE BY ATTACHMENT OF A DECREE OF THE JUDGMENT-DEBTOR.—(1) Where the property to be attached is a decree either for the payment of money or for sale in enforcement of a mortgage or charge, the attachment shall be made—

- (a) if the decrees were passed by the same court, then by order of such court, and
- (b) if the decree sought to be attached was passed by another court, then by issue to such other court of a notice by the court which passed the decree sought to be executed, requesting such court to stay the execution of its decree unless and until,
 - (i) the court which passed the decree sought to be executed cancels the notice, or
 - (ii) the holder of the decree sought to be executed or his judgment-debtor applies to the court receiving such notice to execute its own decree.

(2) Where a court makes an order under cl. (a) of sub-r. (1), or receives an application under sub-head (ii) of cl. (b) of the said sub-rule, it shall, on the application of the creditor who has attached the decree of his judgment-debtor, proceed to execute the attached decree and apply the net proceeds in satisfaction of the decree sought to be executed.

(3) The holder of a decree sought to be executed by the attachment of another decree of the nature specified in sub-r. (1) shall be deemed to be the representative of the holder of the attached decree and to be entitled to execute such attached decree in any manner lawful for the holder thereof.

(4) Where the property to be attached in the execution of a decree is a decree other than a decree of the nature referred to in sub-r. (1) the attachment shall be made by a notice by the court which passed the decree sought to be executed to the holder of the decree sought to be attached, prohibiting him from transferring or charging the same in any way ; and when such decree has been passed by any other court, also by sending to such other court a notice to abstain from executing the decree sought to be attached until such notice is cancelled by the court from which it was sent.

(5) The holder of a decree attached under this rule shall give the Court executing the decree such information and aid as may reasonably be required.

(6) On the application of the holder of a decree sought to be executed by the attachment of another decree, the Court making an order of attachment under this rule shall give notice of such order to the judgment-debtor bound by the decree attached ; and no payment or adjustment of the attached decree made by the judgment-debtor in contravention of such order after receipt of notice thereof, either through the Court or otherwise, shall be recognised by any Court so long as the attachment remains in force. (O. 21, r. 53.)

LEGAL CHANGES.—The corresponding section in the old Code of 1882 was 279 in which the following important changes have been made—1. The words “ or for sale in enforcement of a mortgage or charge ” are added in sub-r. (1). 6 C.W.N. 5 ; 5 I.C. 302 ; A.W.N. (1895) 184 ; 28 A. 771 ; 28 M. 473 ; 4 C.W.N. 35 ; 2 C.L.J. 499 are rulings under the old Code which are conflicting. 2. The words “ or his judgment-debtor ” are added in sub-r. (1), of (b). It gives legislative recognition to the opinion of Maclean, C.J. in 24 C. 778. The decision of the Madras High Court, 35 M. 622, is thereby rendered absolute in so far as it decides that the only person competent to execute will be the attaching creditor. See now 17 I.C. 323 = 13 M.L.T. 227. 3. Sub rr. (3) and (6) are new.

SCOPE.—O. 21, r. 53 applies to attachment before judgment. 22 M.L.J. 394 = 14 I.C. 285. This rule prescribes the mode in which decrees are attached and realised whether they are for moveable or immoveable property. They are a class by themselves. 44 I.C. 252 = 16 N.L.R. 72. O. 21, r. 54 does not apply in case of decrees for immoveable property. 10 B. 444 ; 2 A. 290. Decrees for money and for sale in enforcement of a mortgage or charge are to be realised by execution thereof under sub-rule (1). 44 I.C. 252 = 16 N.L.R. 72 ; 1 Rang. 360 ; 45 B. 343 ; 59 I.C. 541 = 22 Bom. L.R. 1304. While other decrees that are attached may be realised by the sale of the decree attached. 6 C. 243 ; sub-r. (4). A right arising from the decree by way of restitution cannot

be attached under the rule. 24 M. 341. A Revenue Court decree is not liable to attachment and sale in execution of a decree of a Civil Court under this rule, 21 A. 405.

Court.—The Collector has no power to attach a decree. 9 W.R. 133; 12 W.R. 329; 10 C.L.J. 226; 14 O.W.N. 96.

DECREE FOR MONEY.—A decree for dissolution of partnership may be regarded as a money decree and can be attached and not sold. 27 B. 556; 24 M. 341. A decree for partition is not a money decree. 16 B. 522. A decree for foreclosure of a mortgage is not covered by sub-r. (1) of r. 53; and is to be realised by sale thereof. 26 A. 91. A decree for mesne profits is a decree for money. 48 I.C. 153=1918 Pat. 257. A decree for sale on failure to redeem for mesne profits and costs is after redemption a decree for money. 4 Pat. L.J. 336. A right to recover mesne profits is not a money decree, 24 M. 341.

MODE OF EXECUTION BY ATTACHMENT OF MONEY DECREES.—A decree for money cannot be sold. 2 A. 90; 6 M. 418; 20 C. 111; 27 B. 556; 1 I.O. 535. The procedure laid down in this rule by attachment and execution is to be followed. 44 I.C. 252=16 N.L.R. 72; 1 Rang. 360=1923 Rang. 21; 2 A. 290; 20 C. 111; 27 B. 556; 6 M. 418. Decrees in enforcement of a mortgage or charge are to be attached and realised in the same manner as money decrees. 45 B. 343; 44 I.O. 252=16 N.L.R. 72. Under the old Code the decisions were conflicting. 28 A. 771; 28 M. 473. The rulings, 6 C.W.N. 5, 2 C.L.J. 499, 5 I.O. 302=11 C.L.J. 78, are no longer good law now. The Court ought to proceed to execute the attached decree and apply the net proceeds in satisfaction of the decree sought to be executed. 45 B. 373; 59 I.O. 541; 48 I.C. 183; A.W.N. (1885) 123.

CALCULATION OF INTEREST IN BOTH THE DECREES.—When a certain sum is deposited in Court in satisfaction of the attached decree it operates as a satisfaction of the decree sought to be executed to the extent of the amount deposited from the date of the deposit and the interest ceases to run not merely under the decree attached but also under the decree sought to be executed. 64 I.O. 780=35 C.L.J. 109; 24 I.O. 795.

ADJUSTMENT OF THE ATTACHED DECREE.—An adjustment of the attached decree out of Court after notice to the judgment-debtor does not bind the holder of the decree sought to be executed. 61 I.O. 815=13 L.W. 34; 48 I.O. 109=(1918) M.W.N. 877. It is not competent to the holder of the decree attached to apply to enter satisfaction of the decree even though no notice of the attachment was given to the judgment-debtor under sub-r. (6). 48 I.O. 109=24 M.L.T. 492. There is nothing in law to prohibit the adjustment out of Court between the decree-holder who attaches the decree and the judgment-debtor of the decree attached. 79 I.O. 900=5 Pat. L.T. 621. Sub-r. (6) is new and gives legislative recognition to the practice followed under the old Code. 16 B. 522.

PERSONS ENTITLED TO EXECUTE THE ATTACHED DECREE.—Under the old Code the holder of a decree attached by his creditor could not execute the decree. The attaching creditor was the person entitled to execute it and was liable for damages if he allowed the decree to be barred by negligence or like causes. 35 M. 622; 24 C. 778. But under the present Code the holder of the decree sought to be executed has the same power to execute the decree as the holder of the decree attached. 44 P.R. 1919=86 P.W.R. 1918=46 I.O. 584; 17 I.O. 323; 13 I.O. 324=22 M.L.J. 161; 27 I.O. 953 (under the old Code); under sub-r. (3) he is the representative of the holder of the decree attached for the purposes of execution. A who attaches a decree against himself and others in execution of his own decree, is entitled to execute the attached

decree against his co-judgment-debtors in the attached decree. 2 I.C. 626—6 A.L.J. 561. An attachment under O. 21, r. 53 prevents the Court from proceeding with the execution of the decree attached, but does not render it incapable of execution or destroy the decree-holder's interest in it. It merely delays the realisation of his interest in it. There is nothing in the C.P. Code to prevent the execution application being filed by him. 13 M.L.J. 265.

Assignee of the Judgment-debtor.—The only two persons who can take out execution under the rule are the holder of the attached decree or the attaching creditor and not the assignee of the holder of the attached decree. (1912) M.W.N. 176—13 I.O. 659; 26 B. 305; 5 M.L.T. 278; (1910) M.W.N. 4; (1912) 1 M.W.N. 1 (*contra* in 17 I.C. 323). But the right of the assignee and assignor is subject to the right of the attaching creditors. 17 I.O. 323. Whoever of the two, the holder of the decree to be executed or the holder of the decree attached, may take out execution, he must hold the proceeds realised in execution in trust for the satisfaction of the rights of the attaching decree-holder in the first instance and the balance for the holder of the attached decree. 17 I.O. 323—13 M.L.T. 227. The provisions of sub-r. (3) refer to the stage at which execution of the attached decree is being sought, and not to a case where the application for the attachment of the decree has been disallowed. 27 I.O. 353—17 O.C. 374.

STAY OF EXECUTION.—When a decree is transferred to a certain person and the same is attached in execution of a decree against the transferor, the Court which passed the decree transferred is bound to stay its execution. 7 M.L.T. 83; (1912) M.W.N. 176. If the Court proceeds to execute the decree in spite of the order of attachment, the procedure is not merely irregular but illegal and void and the sale effected must be set aside. 32 O. 1104. The Court receiving a notice of attachment of its decree from another Court is bound to stay execution of its decree until the Court attaching the decree cancels such notice or the holder of the attached decree applies for execution. (1912) M.W.N. 176.

STAY OF EXECUTION AND RUNNING OF LIMITATION.—A stay of execution under this rule does not suspend the running of period of limitation for the execution of the decree as such a stay does not fall under S. 15 of the Limitation Act. It is not an absolute stay of execution, it is only a limited stay of execution. It does not prevent the holder of the decree sought to be executed or his judgment-debtor from seeking to execute the original decree. 48 B. 485.

DEATH OF THE HOLDER OF THE DECREE ATTACHED.—In executing the decree of his judgment-debtor, the attaching decree-holder is under no obligation to bring upon the record the representatives of the deceased judgment-debtor who is holder of the decree attached. A.W.N. (1900) 99; 12 A. 440.

DECREE FOR MAINTENANCE CHARGING IMMOVEABLE PROPERTY.—Where a decree-holder in execution of his decree attaches a decree for maintenance charging immoveable property, his proper course is to apply for execution of the maintenance decree, purchase the interest and bring a separate suit under O. 34, r. 14, C.P. Code, for sale. Alternatively he may as representative of the holder of the maintenance decree under O. 21, r. 53 (3) attach and bring to sale the property of the defendant in the maintenance decree. 23 M.L.T. 355—47 I.C. 630.

MORTGAGE DECREE.—The executing Court is not at liberty to sell the mortgage decree but it is bound under the provisions of O. 21, r. 53, C.P. Code, to proceed to execute the attached decree and apply the net proceeds in satisfaction of the decree

sought to be executed. 22 Bom. L.R. 1304=59 I.C. 541; 8 A.L.J. 1327=12 I.C. 924. A decree-holder who attaches and purchases the mortgage-decree of the judgment-debtor is the latter's lawful representative and is entitled to execute the decree attached in any manner lawful for the holder thereof irrespective of what is conveyed to him by the sale certificate. 22 M.L.J. 161.

DECREE FOR COSTS AND MESNE PROFITS is a decree for money and must be attached and proceeded within the manner provided in O. 21, r. 53. (1918) Pat. 257=48 I.C. 183.

WHEN THE DECREE FOR MONEY IS SOLD.—When the decree attached is sold notwithstanding the provisions of this rule, the attaching decree-holder who purchases it, and realises a larger amount than is paid for it is bound to give credit to the judgment-debtor for the full amount realised by him. 45 B. 343. If a sale takes place, in spite of r. 53, of a money decree, it is not altogether invalid and without jurisdiction, especially when the decree-holder raises no objection to his creditor bringing the decree to sale. 1 I.C. 535=5 M.L.T. 278.

APPOINTMENT OF RECEIVER.

O. 40, R. 1.—APPOINTMENT OF RECEIVER.—(1) Where it appears to the Court to be just and convenient, the Court may by order,—

- (a) appoint a receiver of any property whether before or after decree;
- (b) remove any person from the possession or custody of the property;
- (c) commit the same to the possession, custody or management of the receiver; and
- (d) confer upon the receiver all such powers as to bringing and defending suits and for the realisation, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits and the execution of documents as the owner himself has, or such of those powers as the Court thinks fit.

(2) Nothing in this rule shall authorise the court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove.

O. 40, r. 22.—REMUNERATION.—The Court may by general or special order fix the amount to be paid as remuneration for the services of the receiver.

O. 40, R. 3.—DUTIES —Every receiver so appointed shall,—

- (a) furnish such security (if any) as the Court thinks fit duly to account for what he shall receive in respect of the property ;
- (b) submit his account at such periods and in such form as the Court directs ;
- (c) pay the amount due from him as the Court directs ; and
- (d) be responsible for any loss occasioned to the property by his wilful default or gross negligence.

O 40, R. 4.—ENFORCEMENT OF RECEIVER'S DUTIES.—Where a receiver,

- (a) fails to submit his accounts at such periods and in such form as the Court directs, or
- (b) fails to pay the amount due from him as the Court directs, or
- (c) occasions any loss to the property by his wilful default, or gross negligence,

the court may direct his property to be attached and may sell such property and may apply the proceeds to make good any amount found to be due from him or any loss occasioned by him and shall pay the balance (if any) to the receiver.

O. 40. R. 5.—WHEN COLLECTOR MAY BE APPOINTED RECEIVER.—Where the property is land paying revenue to the Government or land of which the revenue has been assigned or redeemed and the Court considers that the interests of those concerned will be promoted by the management of the Collector, the Court may, with the consent of the Collector, appoint him to be receiver of such property.

OBJECT OF APPOINTING A RECEIVER.—The object of appointing a receiver is the preservation of the subject-matter of the litigation pending a judicial determination of the rights of the parties thereto. He is appointed for the benefit of all concerned. 34 O. 305 ; 34 O. 316.

WHAT COURTS MAY APPOINT OR REMOVE, ETC., A RECEIVER.—Under S. 505 of the old Code of 1882 only the High Courts and the District Judges could appoint receivers. That section has been omitted from the present Code, and the result is that under the present Code all the Courts are empowered to appoint a receiver, 34 O. 305 ; 31 O. 495 ; 18 A. 453 ; 2 B. 558 (Rulings under the old Code). It is only the Court in which the proceedings are pending that can appoint a receiver. A District Court cannot appoint a receiver of property which is the subject of dispute in another Court, even though the latter is subordinate to the former, 23 C. 517. An application for removal of the receiver should be made to the Court in which the suit is filed and by which the receiver is appointed, 7 L.L.J. 6 ; 2 Hay. 395.

A RECEIVER IS AN OFFICER OF THE COURT.—A receiver is appointed by the Officer of the Court and is subject to its orders. His possession is the possession of the Court. The money in his hands is the *custodia legis* for the person who can make a title for it, 17 M. 501 ; 22 O. 1011 P.C. ; 26 C. 625 ; 78 I.O. 420 ; 39 C.L.J. 40 ; 78 I.O. 620=3 Pat 357. Property in the hands of the receiver cannot be attached without the leave of the Court first obtained, 16 B. 577. But when no attachment is necessary, as in mortgage decrees, the sale can be effected without permission by the Court, as in such a case there is no interference with the possession of the receiver, 26 O. 127. A receiver duly appointed is to be considered as an officer of the Court from the moment of his appointment, 37 C. 754 ; 8 I.O. 976=5 L.B.R. 213 ; 78 I.C. 620=(1924) Pat. 491. Any interference with the possession of the receiver is a contempt of Court, 26 C. 625 ; 6 B.L.R. 486 ; 22 I.C. 417=18 C.W.N. 289. A receiver cannot sue or be sued except with the leave of the Court by which he was appointed and the leave must be obtained before the institution of the suit, 10 C. 1014 ; 30 C. 593 ; 30 C. 721 ; 32 C. 270 ; 26 M. 492. A receiver of Insolvent's property appointed under S. 35 of the C.P. Code of 1882 (which section is now repealed by the Provincial Insolvency Act, 1907) had no power to institute a suit for recovery of Insolvent's property even with the previous sanction of the Court which appointed him receiver, 56 P.R. 1913. As the acts of the receiver are the acts of the Court, the estate is liable for the debts incurred by the receiver in priority to other debts of the estate, 30 C. 937 ; 6 M. 138. A receiver being an officer of the Court it is contempt of Court on the part of any of the parties to enter into an agreement with him restricting and controlling his powers, 22 O. 648. A Court alone can determine the fees of the receiver. A promise by a party to pay the remuneration of a receiver without leave of the Court is against law and is not binding on the promisor, 30 C. 696. The appointment of a receiver operates as injunction against the parties, their agents and persons claiming under them from interfering with the possession of the receiver except by permission of the Court, 21 C. 85.

Attachment of property in the hands of the receiver.—See Chapter VI.

A receiver cannot sue or be sued without the leave of the Court, 10 C. 1014 ; 30 C. 593 ; 30 C. 721 ; 1923 Rang 209 ; 56 P.R. 1913 ; 17 I.O. 916=5 Bur. L.T. 163 ; 26 M. 492. Omission to obtain leave of the Court previous to the institution of the suit is a defect that can be cured by granting of the leave subsequently, 8 I.O. 1=15 C.W.N. 54 ; 15 C.W.N. 872=10 I.O. 527 ; 34 C. 305 ; 56 I.O. 424=22 Bom. L.R. 319 ; 61 I. C. 888 ; 43 M. 793 ; 46 O. 352 ; 15 L.W. 289 (*contra* was held in 32 O. 270 ; 24 I.O. 622, holding that such an omission cannot be rectified by subsequent application). The leave granted after the institution of the suit relates back to the time of the

institution of the suit, 63 I.C. 848. The receiver may be granted leave to sue in the order by which he is appointed.

Liability for Criminal Prosecution.—A receiver cannot be prosecuted for Criminal Breach of Trust without the leave of the Court, 46 C. 432.

LIABILITY FOR DEBTS INCURRED BY THE RECEIVER.—An estate is liable for the debts incurred by the receiver during his management of the estate, 30 C. 937. If a loss arises the estate is liable for it as between the parties to the suit, 17 M. 501; 20 M. 224 F.B. The receiver acts as an officer of the Court; while the executor or trustee, while not so acting, cannot create obligations binding on the estate, 3 I. C. 937.

REMUNERATION OF RECEIVER.—The Court has a discretion to allow commission to the receiver at a fixed rate, 1923 C. 516. An agreement to pay remuneration of a receiver without leave of the Court is not binding on the persons promising, being in contravention of law. A suit does not lie on such an agreement, 30 C. 696; 22 C. 648. A receiver has a lien on the estate for his remuneration, 22 C. 960. A receiver is entitled to the costs, charges and other expenses incurred in the discharge of his duty as such, 19 B. 660.

WHEN A RECEIVER MAY BE APPOINTED.—A receiver may be appointed when the object is the preservation of the property which is the subject of the suit or proceedings, 18 M. 23; as in a suit for partition of joint family property when the allegation of a party is that the other has misappropriated large sums of money and thrown the accounts into confusion (*ibid.*). Where in a suit the defendant has received a large amount of property under circumstances which might fairly give rise to suspicion during the pendency of a suit relating to the property, the appointment of a receiver is justified, 27 C. 279. In a suit for foreclosure or sale, a receiver may be appointed of the mortgaged property, 7 C.W.N. 452; 14 B. 431. In a testamentary suit a receiver may be appointed, 17 M. 383. In the partnership suits, when between the co-partners, a receiver is usually appointed where the partnership is already dissolved, even where the parties have referred to arbitration the matters in dispute, 39 Oh. D. 538. A receiver may be appointed while an arbitrator is proceeding with a reference, 78 I.C. 84. A Court has power to appoint a receiver in the *interim* between the submission of the award and the final acceptance or rejection of it, 78 I.C. 84. A receiver should be appointed in a maintenance decree in order to avoid any difficulty in executing it, 26 C. 441. Where a receiver has been appointed on the ground that the property was the subject-matter of the suit and it afterwards turns out on appeal that the decree only operates against the defendants personally, the appellate court has jurisdiction to maintain the receiver as a method of realising the decretal amount from the judgment-debtor personally, 30 M. 255. A manager may be appointed of property attached in execution, 53 P.R. 1874. A receiver may be appointed for the purpose of executing a decree, even if the decree is one for the payment of money, 31 I.C. 285=11 N.L.R. 113; 11 B. 448; 28 C. 483; S. 51. Where the interests of the decree-holder and the judgment-debtor can be safe-guarded in this way, a receiver may be appointed in execution, 35 I.C. 285. Where decrees in favour of the judgment-debtor are attached, a receiver may be appointed for their realisation if the interests of the parties are saved thereby, 30 A. 393. A receiver can be appointed to receive rents and profits of the property which cannot itself be attached, 31 I.C. 285=11 N.L.R. 113; 39 C. 1010. A receiver may be appointed to deal with the rents and profits of land assigned to a Hindu widow for her maintenance, even if she has no other source of income, 31 I.C. 285. A receiver cannot be appointed to receive the pension of a judgment-debtor, 4 I.C. 145=12 O.C. 323. The fact that the judgment-debtor will be reduced to poverty if his properties

are allowed to be sold is no ground for the appointment of a receiver, 28 I.C. 505. A receiver may be appointed for realising the rents and profits of property assigned for the maintenance. And after paying out a sufficient and adequate sum for the maintenance of the judgment-debtor and his family, the balance if any may be applied to the liquidation of the judgment-debtor's debt. 85 I.C. 477=1925 A. 297. A receiver cannot be appointed of the future earnings of a judgment-debtor to enforce satisfaction of a judgment debt. 38 O. 13; 34 M. 7; 40 M. 302. A receiver may be appointed for the purpose of executing a decree. 31 I.C. 285=11 N.L.R. 113.

A RECEIVER MAY BE APPOINTED WHEN IT IS JUST AND CONVENIENT.—The Court is to appoint a receiver for the protection of the rights or for the prevention of injury according to legal principles. 34 I.C. 693. The mere ground that the appointment will do no harm to any one is no ground for appointing a receiver. 15 O. 818; 22 O. 459. A Court has a right to proceed under O. 40, r. 1, when it appears to it to be just and convenient to do so and the order is not illegal because it is made *suo moto*. 36 A. 19. The mere ground that the judgment-debtor will be reduced to poverty if the properties are sold is no ground for appointment. 28 I.C. 505. A receiver can be appointed in execution only in respect of property which has been the subject of attachment. A receiver cannot be appointed for realising future maintenance because it is not liable to attachment. 40 M. 302.

Administrative suit.—The correct method of executing a decree in an administration suit is to appoint a receiver to get in the debts, collect the moveable property and sell it or collect the proceeds of it, if sold, and to collect money; also to sell the immoveable property, if necessary to do so, to meet the charges and legal expenses payable out of the estate, the other immoveable property to be distributed amongst the heirs according to their shares. 8 S.L.R. 338=36 I.C. 385.

It is left to the Court to make the appointment of a receiver when it is just and convenient. 36 P.R. 1910; 57 I.C. 27=14 O.W.N. 252; 11 I.C. 870=21 M.L.J. 821; 8 I.C. 1191=3 Bur. L.T. 95. The applicant should at least present a *prima facie* case and convince the Court that there is fair chance of his succeeding in the suit. 68 I.C. 656=3 Pat. L.T. 466. The discretion of the Court should not be arbitrary but sound and reasonable, guided by judicial principles, and it is liable to be set aside in appeal. 10 O. 713, 1 Lab. Cases, 514; 68 I.C. 656; 36 P.R. 1910; 45 I.C. 224=11 S.L.R. 115; 55 I.C. 50=30 P.W.R. 1920; 12 A. 436; 18 B. 474. The Court is bound to look to all the circumstances of the case. 18 B. 474, 484; 77 I.C. 783=28 O.W.N. 86; 6 Lab. 74; 15 O. 818; 22 O. 459; 13 M. 390; 55 I.C. 50=30 P.W.R. 1920; 45 I.C. 224=11 S.L.R. 115. The receiver cannot be appointed as a matter of course or for the reason that it can do no harm to appoint one. 77 I.C. 783=28 O.W.N. 86; 5 A. 556; 79 I.C. 561. Preservation of the estate pending litigation on a consideration of the merits of the conflicting titles, the risk to the tenants and other circumstances of the case should be considered in appointing a receiver. 4 H.L.C. 997; 2 Ch. 573; 15 O. 818. The Court will always look to the conduct of the party who makes the application for a receiver, and will not interfere unless his conduct is free from blame. 2 Beav. 279; Kerr, 8. Where the subject-matter of the litigation is *in medio*, in the enjoyment of no one, the Court does no wrong by taking possession by its officers. 77 I.C. 783=28 O.W.N. 86. A receiver should not be appointed in supersession of a *bona fide* possessor of the property in controversy, except for some substantial reasons. 77 I.C. 989=1924 O. 456; 14 O.W.N. 252. In certain circumstances a receiver may be appointed in supersession of an executor of a Mahomedan testator. 19 B. 83. The convenience of the decree-holder alone is not a sufficient consideration for the appointment of a receiver. 21 I.C. 283=16 O.C. 238. The properties which cannot be attached and sold do not vest in the receiver. 23 A.L.J. 648.

A Civil Court acting under this order cannot appoint a receiver in supersession of the receiver appointed by the Magistrate under S. 146 (2), Cr. P.C. When a Court appoints a receiver for purposes of execution of a decree, the order is one under O. 40, r. 1 read with S. 51 of the C. P. Code. If a receiver is appointed without any direction given as to security, the order takes effect at once and he is validly in possession though no security has been given. If the appointment is conditional upon the furnishing of security, the giving of security is a condition precedent, and there is no effective appointment till security has been given. 14 C.L.J. 489=12 I.C. 745. Mere convenience of the decree-holder is not a sufficient consideration to justify the appointment of a receiver. One of the mortgaged properties proving to be unsaleable, the mortgagee in execution of his decree for sale applied for the appointment of a receiver to realise the rents and profits of that property, but at the same time he was entitled to bring the mortgaged property to sale and there was nothing to show that his security had become inadequate or that the other mortgaged properties would prove insufficient to pay off the debt. *Held*, that under the circumstances, the mortgagee was not entitled to have the receiver appointed; the mere fact of one property proving to be unsaleable being no ground for dispensing with the sale of the remaining ones. 16 O.C. 238=21 I.C. 283. S. 51 of the Code empowers the Court to appoint a receiver of the rent of the estate of the deceased person for the purpose of liquidating debts against that estate and there is nothing in the Code to limit the appointment of a receiver of rent to a case where the debt to be discharged was a debt against the husband and not against the deceased holder of the estate. 22 O.C. 194=52 I.C. 305. A receiver may be appointed to collect the rents and profits in execution of a decree though the estate itself cannot be attached. 39 C. 1010. Appointment of a receiver is a form of execution under S. 51 (1) C. P. Code. 78 I.C. 1031. An executing Court can appoint a receiver for the realisation of property by prosecuting causes of action outside the jurisdiction. 13 L.W. 150. The appointment of a receiver at the instance of the judgment-debtor is equitable execution. 26 C. 772. S. 51 does not give any right to the judgment-debtor to apply for the appointment of a receiver. 67 I.C. 606=1922 P. 369. A receiver may be appointed even after the decree. 8 M. 229. A receiver cannot be appointed of properties dealt with by a magistrate under Cls. (1) and (2) of S. 146 of the Cr. P. Code. 40 C. 862.

Direction authorising decree holder to receive rents.—When a decree-holder was authorised to receive the rents of the attached property due to the debtor, the effect of the order is to constitute the decree-holder receiver without the direct intervention of the Court. On failure of payment of rent to such decree-holder after partial satisfaction of decree, the proper course for him is to file a regular suit as receiver. 7 C. 61.

WHO MAY BE APPOINTED RECEIVER.—The receiver appointed by the Court should as a general rule be a person uninterested in the subject-matter. 77 I.C. 783=28 C.W.N. 86. One of the parties to the litigation should not be appointed receiver without the consent of others. 19 I.C. 873=17 C.W.N. 974; 22 I.C. 601=18 C.W.N. 533. The fact that the person to be appointed resides at a great distance from the property which is to be subjected to his management, is an important factor to be taken into consideration. 19 I.C. 873=17 C.W.N. 974.

EFFECT OF APPOINTMENT OF RECEIVER.—When in execution proceedings a receiver is appointed, he is put in the position of the judgment-debtor and there is no transfer of the property from the judgment-debtor to him. 81 I.C. 741. The appointment of a receiver operates as an injunction against the parties, their agents and persons claiming under them from interfering, with his possession except by permission of the Court. 78 I.C. 811=7 M.L.J. 16. An order appointing a receiver to the property of the judgment-debtor does not stay execution of the decree so as to disentitle the

decree-holder from executing the decree in any manner provided by the Code, even if the receiver is appointed with the consent of the decree-holder. 6 Pat. L.J. 208. The rule (1) empowers the Court to confer upon a receiver all such powers as to bringing and defending suits, as the owner himself has. 27 I.C. 459 = 19 O.W.N. 45.

APPEAL.—An appeal lies from an order granting or rejecting an application to appoint a receiver [(See O. 43, r. 1 (a)); 17 O. 680; 24 B. 38; 7 O. 719; 6 O.L.R. 467; 10 M. 179; 36 P.R. 1910; 17 Bom. L.R. 680; 33 I.O. 795. An order determining that it is just and convenient to appoint a receiver, before an order to appoint a certain person as a receiver is appealable. 40 M. 18 F.B. (*contra* held in 13 C.L.J. 157); 17 Bom. L.R. 510; 42 A. 227; 46 A. 372; 13 A.L.J. 79. Where it is held that an appeal does not lie from an order by which the Court expresses an intention to appoint a receiver and calls upon the plaintiff to suggest names with particulars regarding security and remuneration. Directions given by a Court in passing receiver's accounts are not appealable. 35 O. 568. An order dismissing an objection to the appointment of a receiver of property, by a third party falls under the rule and is appealable. 78 I.C. 1031; 48 I.C. 133 = 3 Pat. L.J. 573; 36 O. 713. An appeal does not lie from an order granting leave to sue a receiver for damages arising from his negligence. 45 B. 99. An order directing a receiver appointed in a suit to make certain payments to a party pending the disposal of the suit is appealable. 14 I.C. 277 = 11 M.L.T. 383. An order authorising a receiver to take possession of property in the custody of a third person not a party to the suit is appealable. 1 I.C. 354 = 6 A.L.J. 351. An order refusing to remove a person from his position of a receiver is not appealable. 78 I.C. 625 = 1924 M. 611; 24 I.C. 862. An order increasing remuneration to be paid to a receiver is not appealable. 22 I.C. 352. An order refusing to direct a receiver appointed in a suit not to interfere with the possession of a third party is an order in effect removing the said person from the possession of the property and is therefore appealable. 69 I.C. 393 = (1922) M.W.N. 725. An appeal lies from an order under r. 4 of this order. 24 I.C. 862; See O. 43, r. (1). An order requiring a receiver to deposit a certain sum due by him into Court unaccompanied by any direction as to the attachment of his property is not an order made under this rule and is not appealable. 65 I.C. 403 = (1921) M.W.N. 806; 4 Pat. L.J. 636; 5 Pat. L.J. 97; 76 I.C. 203; 70 I.C. 293 = 1922 L. 224. An order passing a receiver's accounts is appealable. 45 B. 99.

APPEAL TO THE PRIVY COUNCIL.—No appeal lies to the Privy Council against an order refusing to appoint a receiver. 22 C. 926.

POWER TO DISCHARGE A RECEIVER.—A Court has inherent power to discharge or remove a receiver. 17 I.C. 583 = (1912) M.W.N. 1208; 31 I.C. 908 = (1916) M.W.N. 10. A receiver appointed by the Court with the consent of all the parties should not be discharged or removed except for maladministration. 1924 P.C. 202 = 81 I.C. 576 = 26 Bom. L.R. 1153 P.C. A receiver should not be discharged when appointed in an administration suit before the completion of the decree in the suit. 5 O.W.N. 417. When two receivers are appointed, the retirement of one of them does not put an end to the order of appointment of both. 34 I.C. 789 = 23 C.L.J. 217.

EXECUTION AGAINST RECEIVER.—O. 40, r. 4, provides cases in which execution may be had against the receiver and "the court may direct his property to be attached and may sell such property and may apply the proceeds to make good any amount found to be due from him or any loss occasioned by him and shall pay the balance, if any, to the receiver". Execution may be had against the legal representatives of the deceased receiver. An application may be made for execution against the properties of a receiver in the hands of his legal representative. 39 M. 584.

SURETY'S LIABILITY.—A surety of a receiver is liable to the extent of the amount secured by his recognizance for balance retained improperly by the receiver, interest thereon and the cost of all proceedings necessitated by the default of the receiver, such as taking accounts, attachment for failure to account, application for his discharge and appointment of another and steps to enforce recognizance. 27 C. L.J. 123=28 I.C. 31.

POWER TO BRING A SUIT.—When a person is appointed a manager to recover debts, a suit by him for its recovery is maintainable though the debt was disputed. 67 P.R. 1877.

NOTICE TO SHOW CAUSE AGAINST EXECUTION.

O. 21, r. 22.—(1) Where an application for execution is made—

- (a) more than one year after the date of the decree, or
- (b) against the legal representative of a party to the decree,

the court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause on a day to be fixed why the decree should not be executed against him :

Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution, if the application is made within one year from the date of the last order against the party against whom execution is applied for, made on any previous application for execution or in consequence of the application being made against the legal representative of the judgment-debtor, if upon a previous application for execution against the same person the court has ordered execution to issue against him.

(2) Nothing in the foregoing sub-rule shall be deemed to preclude the court from issuing any process in execution of a decree without issuing the notice thereby prescribed, if for reasons to be recorded it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice.

RULE MADE BY THE HIGH COURT OF ALLAHABAD.—O. 21, r. 22 (2).—In O. 21 substitute "two years" for "one year" both in r. 22 (1) (a) and in the second line of the proviso to r. 22.

LEGAL CHANGES.—Sub-r. (2) is new. It provides for cases when a notice may be dispensed with.

APPLICABILITY.—After the issue of Rules by the High Court under S 104 of the T. P. Act the provisions of O. 21, r. 22 do not apply to proceedings in execution of mortgage decrees. A sale of mortgaged property cannot be set aside on the ground that no notice as required by O. 21, r. 22 had been issued and served on the judgment-debtor prior to the taking of the proceedings in execution. 5 I.C. 101.

OBJECT.—The object of the service is not merely to give the judgment-debtor an opportunity to show cause why the decree should not be executed, but also to give him an opportunity to satisfy it before execution issues. 9 I.C. 584 ; 13 C.L.J. 162 ; 88 I.C. 1039. The object of the rule is merely to protect the judgment-debtor. 2 Pat. 916 = 74 I.C. 838.

NOTICE BY THE COURT EXECUTING THE DECREE.—The notice required by O. 21, r. 22 should be given by the Court to which the decree is sent for execution and to which the application for execution is made and not by the Court to which the application for transmission is given because it is for the former Court to decide whether the application is capable of execution. 43 C. 903 F.B. ; 15 O.W.N. 661 = 8 I.C. 22 ; 15 C.L.J. 123 ; 54 I.C. 1 ; 11 Bom. H.C.R. 10 ; 87 I.C. 21.

NOTICE IN WHAT CASES NECESSARY.—The Court executing the decree shall issue notice in the following two cases : (a) When the application is made more than one year after the date of the decree or from the date of the last order against the person against whom execution is applied for, made on any previous application for execution. 74 I.C. 202 = (1919) Pat. 386 ; 2 I.C. 941 ; 29 C. 580 ; 40 I.C. 670 ; 44 C. 954 ; 13 W.R. 400 ; 87 I.C. 531 = (1925) Pat. 121. For the meaning of "date of the decree" see Chapter I, also 44 C. 954 ; 5 L.L.J. 67. (b) When the application is made against the legal representative of a party to the decree, unless upon a previous application for execution against the same person, the Court has ordered execution to issue against him. 47 C. 72 P.C. ; 2 I.C. 941 ; 29 C. 580 ; 40 I.C. 670 ; 20 C. 370 ; 6 C. 103 ; 3 A. 424 ; 31 C. 822 ; 87 I.C. 21. This rule does not require that a fresh notice must be served for every application for execution made more than one year after the last order against the judgment-debtor. 74 I.C. 838 = (1923) Pat. 283 ; 87 I.C. 531. If the representation of the deceased commenced during the pendency of execution, no notice is required. 75 I.C. 46 ; 86 I.C. 745.

APPLICATION FOR RATEABLE DISTRIBUTION AND NOTICE.—No notice to the judgment-debtor is necessary under O. 21, r. 22 when a decree-holder applies, for further execution, one year after the date of his previous execution application but before one year from the date when he applied for rateable distribution for the satisfaction of the same decree. 9 M. 508.

NOTICE IS ESSENTIAL.—Sub-Cl. (1) of r. 22 is imperative and must be followed unless notice prior to execution has been dispensed with under Sub-Cl. (2) in which case the Court should definitely record its reasons for doing so. 33 M.L.J. 559 = 40 I.C. 670 ; (1919) Pat. 386 ; 20 C. 370 ; 6 C. 103.

WHEN NOTICE MAY BE DISPENSED WITH.—The notice may be dispensed with, if for reasons to be recorded, the Court considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice. 33 O. 306. The provisions of sub-r. (2) are discretionary and not mandatory. 47 M. 288 F.B. ; 45 M. 875 ; 73 I.C. 241 = 26 O.O. 288.

SERVICE OF NOTICE WHEN COMPLETE.—A process is executed when notice under O. 21, r. 22 has been served and limitation under Art. 164, Limitation Act, runs from the date of such notice. 34 M. 88; (1917) Pat. 52=36 I.C. 999.

Notice to a minor.—When all the co-tenants judgment-debtors live in the same house and some of them are minors whose guardians *ad litem* have died and no new appointment has been made in the execution proceedings, a notice to the minor is effected by delivering to all the members notice at their house. 64 I.C. 25 (C.). A mere issue of notice is not sufficient under the rule. It must be served. 25 O.W.N. 972.

DATE OF ISSUE OF NOTICE.—The date of issuing notice for the purposes of Art. 182, Limitation Act, under O. 21, r. 22 means the date on which the order for the issue of notice is passed and not the date on which the notice was actually prepared and issued by the proper authority. 28 B. 416.

NOTICE TO THE PERSON AGAINST WHOM EXECUTION IS APPLIED FOR.—Notice should be given to all judgment-debtors against whom execution is desired. 40 M. 1127. Omission to give notice to one of the judgment-debtors does not vitiate the sale as against other judgment-debtors. 45 I.C. 699. When one of the several judgment-debtors has no interest in the property affected by the decree, a failure of notice to him does not vitiate the proceedings in execution. 88 I.C. 1089.

EFFECT OF OMISSION TO GIVE NOTICE.—When the judgment-debtor had been given an opportunity to show cause why the decree should not be executed against him, the mere fact that no notice was served on him under O. 21, r. 22 does not vitiate the proceedings. 118 P.L.R. 1920=55 I.C. 189. If an order for execution has been made without notice to the judgment-debtor as required by O. 21, r. 22 it is not sufficient to debar him from urging the objection of limitation. 8 I.C. 22; 5 I.C. 59; 11 C.L.J. 357; 14 O.W.N. 433; 7 I.C. 55; 12 C.L.J. 312; 15 C.L.J. 123. The omission to give notice under O. 21, r. 22 is not a mere irregularity which makes the proceedings voidable but is a defect which goes to the root of the proceedings and renders them void for want of jurisdiction. 44 C. 954; 27 C.L.J. 528=46 I.C. 221; 2 Pat. L.T. 401; 47 M. 288 F.B. (43 C. 72 referred to); 19 C.W.N. 152=28 I.C. 898; 21 C. 19; 3 A. 424; 20 O. 370; 64 I.C. 476; 41 I.C. 853; 64 I.C. 25; 91 I.C. 711. An Official Assignee of the judgment-debtor who is not served with a notice under O. 21, r. 22 is not bound by the sale of the property. 42 C. 72 P.C. The omission to issue notice under O. 21, r. 22 renders the sale to be without jurisdiction inasmuch as the notice is the foundation of the execution of a decree presented more than a year after the date of the decree. An irregularity in the service of notice is quite a different thing from the absence of the issue of such notice. The former relates to procedure and the latter goes to the root of the jurisdiction of the Court. 61 I.C. 823=(1921) Pat. 181. When after an order for attachment and sale of the property the judgment-debtor dies and the sale is effected without bringing his legal representative on the record, it is not null and void on that account. The cases where a want of notice constitute a material irregularity are quite different. 75 I.C. 46=45 M.L.J. 413. When there is a valid and subsisting attachment of properties in execution of a decree and on an application, made more than a year from the date of the decree, for sale of the properties, the Court sells the properties without notice to the judgment-debtor under O. 21, r. 22, the sale is not without jurisdiction but is merely irregular and is liable to be set aside under O. 21, r. 90. 43 M. 57. This was overruled by 47 M. 288 F.B. In case of mortgage decrees the omission to give a notice under O. 21, r. 22 does not render the sale of the mortgaged property absolutely null and void. 5 O.L.J. 551=48 I.C. 99. When an execution sale was impeached in the appellate Court as a nullity on the ground that one of the two judgment-debtors had died and the sale was held

without notice to his heirs, it was held that the point not having been taken at an early stage of the suit, and no opportunity having been given of showing that the surviving judgment-debtor was entitled to represent the heirs of the deceased, it was impossible upon the facts to say that the sale was a nullity. (1920) Pat. 91=52 I.C. 125. The issue of attachment before the service of notice under O. 21, r. 22, O. P. Code is, in the absence of any sufficient cause justifying an apprehension that the property sought to be attached would be removed or transferred, a mere irregularity in the execution proceedings and not rendered thereby invalid. 26 O. C. 288=73 I.C. 241. The non-service of notice under O. 21, r. 22 upon a defendant after he attains majority is, though it does not render the subsequent proceedings a nullity, a serious irregularity which, until met by a valid defence, is sufficient to set aside the subsequent sale in execution. The burden is on the decree-holder to make out such defence. One such defence might be, to establish by proving that the defendant's interests were fully represented to the knowledge of the defendant by some other party to the proceedings. 63 I.C. 903=(1921) M.W.N. 394. The omission to issue a notice under O. 21, r. 22 does not vitiate the proceedings specially if the omission has not resulted in any injury to the judgment-debtor. 5 L. L.J. 67. A party, who on attaining majority is entitled to appear to the exclusion of his guardian appointed for him during minority, is not a legal representative and is not entitled to a fresh notice. 78 I.C. 12=1925 M. 158.

NOTICE TO A WRONG PERSON.—When a notice is given to an intermeddler, the decree-holder is liable to be met with objection afterwards that the person who was served with notice was really an intermeddler or that in fact there was a true legal representative in execution at the time. 45 B. 1186. When the notice is issued to a wrong person as the legal representative, on a wrong decision by the Court, it is an error of judgment and does not amount to an adjudication without jurisdiction so as to render the sale a nullity. 25 B. 337 P.C.

WAIVER OF NOTICE.—Although a judgment-debtor does not contest a notice under O. 21, r. 22, he can put in objections when his property is attached. 23 O.L.J. 641=11 I.C. 216. When a manager of a joint Hindu family was brought on the record as the legal representative of the judgment-debtor and allowed the execution proceedings to proceed actively for nearly a year without the slightest objection and waived his right to the issue of a fresh proclamation by paying a part of the decretal amount, he cannot subsequently object that the properties attached were his by right of survivorship and he cannot be permitted to say that the decree is incapable of execution against him. 31 O. 822.

DUTY OF COURT TO ENTERTAIN OBJECTION OF JUDGMENT-DEBTOR.—When once a notice is issued under O. 21, r. 22 it is the duty of the Court to entertain objections that might have been raised on behalf of the judgment-debtor under O. 21, r. 22. 5 I.C. 546.

O. 21, r. 22 and Art. 164, Limitation Act.—Notice under O. 21, r. 22 is a process enforcing the decree and the process is executed when the notice is served. 6 I.C. 400=7 M.L.T. 308 (*contra* held in 8 I.C. 663; 2 O. 123. It is not such a process.)

CHAPTER V.

EXECUTION BY DELIVERY OF PROPERTY.

I.—DELIVERY OF PROPERTY TO DECREE-HOLDER.

A —DELIVERY OF PROPERTY IN THE POSSESSION OF THE COURT.

ORDER FOR PAYMENT OF COIN OR CURRENCY NOTES TO PARTY ENTITLED UNDER DECREE.—Where the property attached is current coin or currency notes the Court may at any time during the continuance of the attachment direct that such coins or notes or a part thereof sufficient to satisfy the decree be paid over to the party entitled under the decree to receive the same. (O. 21, r. 56.)

WHERE THE DECREE IS FOR ANY SPECIFIC MOVEABLE OR FOR ANY SHARE, in specific moveable, it may be executed by the seizure if practicable of the moveable or share, and by the delivery thereof to the party to whom it has been adjudged or to such person as he appoints to receive delivery on his behalf. (O. 21, r. 31 (1).)

LEGAL CHANGES.—The phrase "or for the recovery of a wife" has been omitted in the present Code. The report of the Select Committee is—"The Committee have omitted in this rule all reference to a decree for the recovery of a wife, for there can be no such decree under the law, as the wife cannot be treated as a chattel to be delivered over to the husband. When any third person prevents a wife from returning to her husband, the latter may obtain an injunction against him which may be enforced in case of disobedience either by imprisonment of the defendant or by the attachment of his property or by both."

SCOPE.—This rule applies only to specific moveables, and not to debts. 37 M. 381 ; 22 W.R. 36. This rule applies where the property is in the possession of the judgment-debtor. 1 C.W.N. 170.

DECREE FOR SPECIFIC MOVEABLES.—A decree for possession of jewels, clothes, etc., as set out in the plaint is such a decree. 64 P.R. 1690. A decree for possession of three-fourths of a certain estate consisting of moveables and immoveables is a decree for specific moveables. 60 P.W.R. 1909. In order to entitle a plaintiff to obtain such a decree he should allege and prove facts which entitle him to compel the delivery of specific moveable property under the provisions of S. 11 of the Specific Relief Act. 39 M. 1.

POWER TO ORDER PROPERTY ATTACHED TO BE SOLD AND PROCEEDS TO BE PAID TO PERSON ENTITLED.—Any Court executing a decree

may order that any property attached by it and liable to sale or such portion thereof as may seem necessary to satisfy the decree shall be sold, and that the proceeds of such sale, or a sufficient portion thereof, shall be paid to the party entitled under the decree to receive the same. (O. 21, r. 64.)

SCOPE.—A decree-holder may take out the purchase money before the confirmation of sale. 12 O. 252.

B.—DELIVERY OF PROPERTY IN THE POSSESSION OF JUDGMENT-DEBTOR.

(1) **WHERE A DECREE IS FOR THE DELIVERY OF ANY IMMOVEABLE PROPERTY** possession thereof shall be delivered to the party to whom it has been adjudged, or to such person as he may appoint to receive delivery on his behalf, and if necessary by removing any person bound by the decree who refuses to vacate the property.

(2) Where a decree is for joint possession of immoveable property, such possession shall be delivered by affixing a copy of the warrant in some conspicuous place on the property and proclaiming by beat of drum or other customary mode, at some convenient place, the substance of the decree.

(3) Where possession of any building or enclosure is to be delivered and the person in possession being bound by the decree does not afford free access, the Court through its officers may, after giving reasonable warning and facility to any woman not appearing in public according to the customs of the country, to withdraw, remove or open any lock or bolt or break open any door or do any other act, necessary for putting the decree-holder in possession. (O. 21, r. 35.)

SCOPE AND OBJECT.—O. 21, r. 35 has not conferred on Civil Courts a new power of granting a decree for joint possession. It only shows in what manner a decree for joint possession should be executed. 11 L.O. 87. O. 21, rr. 35 and 36 imperatively require that a copy of the warrant of the Court for delivery of possession should be affixed in some conspicuous place on or near the property, the object of the provision being that the co-sharers and tenants may know that possession has been transferred to the decree-holder. Failure to comply with the procedure laid down in the rules is fatal to the delivery of possession. 2 L.L.J. 202—55 I.O. 19 (20 P.R. 1917, followed). When the persons concerned have been made aware of the delivery of possession in the course of execution proceedings and publicity which is the object of the provisions of

the law has been clearly achieved it must be held that there has been substantial compliance with it. 2 L.L.J. 563=68 I.C. 182. One co-sharer can have only symbolical joint possession as is referred to in rule 35 (2) as against another co-sharer in actual enjoyment. 19 A.L.J. 783=68 I.C. 806. The delivery of possession which is directed to be given by O. 21, r. 35, contemplates the decree-holder being put in actual possession. The mere formal delivery of possession which consists in the reading, by the officers, on the land, of the order for putting the decree-holder in possession and taking a receipt from him cannot, of itself, effect such dispossession. 20 B. 351 F.B.; 71 I.C. 845.

DELIVERY OF FORMAL PHYSICAL POSSESSION.—A decree-holder in a partition suit who has been given partial possession of portion of the property allotted to him in an execution case which was dismissed after the delivery of the formal possession, can maintain a fresh application in execution for actual possession under O. 21, r. 35 (1). 45 I.C. 7. When the objector to the delivery of possession had a right of residence in a part of the house, the delivery of the portion should be given according to O. 21, r. 36. 20 I.C. 571. See also *infra*.

A DECREE FOR JOINT POSSESSION.—A plaintiff who has never been in possession, but is entitled to possession jointly with other persons can be granted a decree for joint possession. There is no distinction on principle between the case of a person who was entitled to joint possession but was subsequently dispossessed and the case of a person who was entitled to joint possession, but had not obtained such possession. 33 A. 150.

BAILIFF'S POWER TO USE FORCE.—In a writ of possession the bailiff can use reasonable force in removing the person bound by the writ. 42 C. 313.

SECOND APPLICATION FOR POSSESSION.—A decree-holder is not entitled to file a second application for possession under O. 21, r. 35, C.P. Code after he is once put in possession in accordance with an order passed on a previous application filed under the same order and rule. 29 M.L.J. 504=32 I.C. 44; 4 A. 184.

C.—DELIVERY OF PROPERTY NOT IN THE POSSESSION OF THE JUDGMENT-DEBTOR.

WHERE A DECREE IS FOR DELIVERY OF ANY IMMOVEABLE PROPERTY IN THE occupancy of a tenant, or other person entitled to occupy the same and not bound by the decree to relinquish such occupancy, the Court shall order delivery to be made by affixing a copy of the warrant in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode at some convenient place, the substance of the decree in regard to the property. (O. 21, r. 36.)

SCOPE.—If there is a decree for partition and the lands were in possession of the tenants, delivery could be given under r. 36. 26 M. 78. When lands are held by ryots or tenants, possession may be given under O. 21, r. 36. 15 W.R. 307; 3 M.L.J. 242; 3 L.L.J. 138; 16 P. R. 1893.

Property in possession of mortgagee.—When the property sold is in possession of a mortgagee and the judgment-debtor delivered possession of the property

to the decree-holder under O. 21, r. 36, it is not in fact delivery to the purchasers but it is notice to the mortgagee that the auction-purchaser is entitled to redeem. 22 O.C. 278=54 I.C. 269. A person who claims to enter on the land on a void lease from the judgment-debtor cannot be regarded as a tenant of the judgment-debtor under this rule. The remedy of the decree-holder in such a case is either by criminal prosecution or a suit for damages. 70 I.C. 755=43 M.L.J. 179.

APPLICABILITY.—The provisions of O. 21, r. 36, are under S. 23 (a) (iii) of the Rangoon Small Cause Court Act applicable to a decree for ejectment obtained under the Act. Hence symbolical possession may be given when the property is in the occupation of a sub-tenant not bound by the decree. 85 I.C. 501=1925 R. 98.

II.—DELIVERY OF PROPERTY TO THE PURCHASER.

DELIVERY OF MOVEABLE PROPERTY IN THE POSSESSION OF THE COURT.—Where the property sold is moveable property of which actual seizure has been made, it shall be delivered to the purchaser. [O. 21, r. 79 (1).]

DELIVERY OF MOVEABLE PROPERTY IN THE POSSESSION OF SOME OTHER PERSON.—Where the property sold is moveable property in the possession of some person other than the judgment-debtor, the delivery thereof to the purchaser shall be made by giving notice to the person in possession, prohibiting him from delivering possession of the property to any person except the purchaser. [O. 21, r. 79 (2).]

Where the property sold is a **DEBT NOT SECURED BY A NEGOTIABLE INSTRUMENT, OR IS A SHARE IN A CORPORATION**, the delivery thereof shall be made by a written order of the Court prohibiting the creditor from receiving the debt or any interest thereon, and the debtor from making payment thereof to any person except the purchaser, or prohibiting the person in whose name the share may be standing from making any transfer of the share to any person except the purchaser, or receiving payment of any dividend or interest thereon and the manager, secretary or other proper officer of the corporation from permitting any such transfer or making any such payment to any person except the purchaser. [O. 21, r. 79 (3).]

RIGHT OF THE PURCHASER OF A SHARE IN A CORPORATION.—The purchaser at a court sale of the right, title and interest of a share-holder is not entitled as of right to have his name entered in the register of the company as a share-holder, but he is subject to the same rules on the point as the private purchaser. 41 B. 76. Delivery of debt can be made in the manner prescribed in r. 79, 85 I.C. 469=10 Bur. L.T. 6.

TRANSFER OF NEGOTIABLE INSTRUMENTS AND SHARES.—

(1) Where the execution of a document or the endorsement of the party in whose name a negotiable instrument or a share in a corporation is standing is required to transfer such negotiable instrument or share, the Judge or such officer as he may appoint in this behalf, may execute such document or make such endorsement as may be necessary, and such execution or endorsement shall have the same effect as an execution or endorsement by the party.

(2) Such execution or endorsement may be in the following form, namely :—

A.B. by C.D., Judge of the Court of.....
(or as the case may be) in a suit by E.F. against A.B.

(3) Until the transfer of such negotiable instrument or share, the Court may, by order, appoint some person to receive any interest or dividend due thereon and to sign a receipt for the same ; and any receipt so signed shall be as valid and effectual for all purposes as if the same had been signed by the party himself. (O. 21, r. 80.)

MODE OF DELIVERY OF NEGOTIABLE INSTRUMENT.—A negotiable instrument can be transferred otherwise than by endorsement as an actionable claim. O. 21, r. 80, is merely an enabling provision and where a court passes a vesting order under O. 21, r. 80 in respect of the negotiable instrument, the transferee is entitled to sue on it on the strength of the vesting order and it is enough that he obtains the vesting order before decree. 21 M.L.J. 422=8 I.C. 17.

CANCELLATION OF EXISTING ENDORSEMENT.—Under the provisions of O. 21, r. 80, the court is empowered to cancel a previous endorsement with a view to enable the auction-purchaser to realise the amount of a promissory note purchased by him at a court sale. 4 Bur. L.T. 138=12 I.O. 913.

OTHER CASES OF PROPERTY.—In the case not otherwise provided, for the court may make an order vesting such property in the purchaser or as he may direct and such property shall vest accordingly. (O. 21, r. 81.)

DELIVERY OF IMMOVEABLE PROPERTY IN OCCUPANCY OF JUDGMENT-DEBTOR.—Where the immoveable property sold is in the occupancy of the judgment-debtor or of some person on his behalf or of some person claiming under a title created by the

judgment-debtor subsequently to the attachment of such property and a certificate in respect thereof has been granted under rule 94, the Court shall, on the application of the purchaser, order delivery to be made by putting such purchaser, or any person whom he may appoint to receive delivery on his behalf in possession of the property, and, if need be, by removing any person who refuses to vacate the same. (O. 21, r. 95.)

DELIVERY OF IMMOVEABLE PROPERTY IN OCCUPANCY OF TENANT.—Where the property sold is in the occupancy of a tenant or other person entitled to occupy the same and a certificate in respect thereof has been granted under rule 94, the Court shall, on the application of the purchaser, order delivery to be made by affixing a copy of the certificate of sale in some conspicuous place on the property and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, that the interest of the judgment-debtor has been transferred to the purchaser. (O. 21, r. 96.)

SCOPE.—There is nothing to prevent a decree-holder from making a fresh application under O. 21, r. 96, after he had made a complaint under O. 21, r. 97. 13 O.W.N. 724; 49 I.C. 150 F.B.; 16 I.C. 432=(1913) M.W.N. 179. (13 M. 504 followed; *Contra* in 11 B. 473); 14 P.R. 1910. The failure of a decree-holder purchaser to take action under O. 21, r. 97, is no bar to his putting in a fresh application for possession under O. 21, r. 95, 24 I.C. 512. A decree-holder purchasing subject to encumbrances is bound to pay the total amount due on the encumbrances as a condition of entry. 50 I.C. 909. The provisions of this rule are peremptory. 8 I.C. 368; 1883 P.J. 273. An auction-purchaser of nankar rights acquires full title to them from the date of his purchase and is not required to apply for possession under O. 21, r. 95. 36 I.C. 762=3 O.L.J. 436. When a person purchases in Court auction the undivided share belonging to and in the possession of the judgment-debtor, the auction-purchaser is entitled to effective possession under O. 21, rr. 35 (2) and 95, and not symbolical possession under O. 21, r. 96. 36 A. 181. When property, in the actual possession of the judgment-debtor is sold in execution of a decree, the receipt for possession given by the decree-holder is not sufficient. Actual possession must be delivered. 43 B. 559. When on an application by the auction-purchaser for delivery of possession, the court makes an order directing delivery of possession, but the order is not carried out on account of the default or laches of the purchaser, and the application is dismissed, he may make a fresh application which will be governed by Art. 180 of the Limitation Act. 91 I.C. 485.

WHO CAN APPLY UNDER O. 21, R. 95.—A transferee from auction-purchaser is competent to apply for possession of the property transferred to him under O. 21, r. 95, and S. 146, O.P. Code. 40 A. 216. This rule applies whether the purchaser is the decree-holder or not. 4 Pat. L.J. 716. A purchaser is entitled to possession after he obtains a certificate of sale, but a mere want of certificate does not make him liable to be ousted from the property of which he has taken possession under this rule. 6 B. 139; 5 B. 206.

SCOPE.—O. 21, R. 96 —Property in the hands of a Receiver.—O. 21, r. 96, does not apply to property in the hands of a receiver and he can be sued only with the leave of the Court. 63 I.C. 685. The delivery of formal possession under rule 96 in cases in which such delivery is permitted by that rule has the same legal effect as the delivery of actual possession under O. 21, r. 95. (See *infra*.)

APPEAL.—An appeal lies against an order under O. 21, r. 95, delivering possession to auction purchaser decree-holder. 20 C.W.N. 829=35 I.C. 468 F.B. ; 40 A. 216.

DELIVERY OF UNDIVIDED SHARE IN IMMOVEABLE PROPERTY.—A purchaser of an undivided share cannot apply under r. 95. He must bring a regular suit for partition and delivery of what may be allotted as the share of the undivided member. 29 A. 294 ; 49 I.C. 629=25 M.L.T. 153 ; 29 I.C. 976=28 M.L.J. 642. Where the property of which possession is directed to be delivered to an auction-purchaser belongs to members of an undivided Hindu family some of whom were not parties to the suit and the purchaser applied to the Court to deliver the property to him free from obstruction, the property should be deemed to be in possession of the undivided members who cannot be dispossessed, in execution, of their interest. The case falls under O. 21, r. 99, and not under O. 21, r. 97, and the petitioner's remedy is to sue for physical possession of the share of the judgment-debtors. 14 I.C. 282.

LIMITATION FOR APPLICATION FOR POSSESSION.—An application for possession by the auction purchaser should be made within 3 years from the date on which the certificate of sale was issued and granted to him under Art. 180 of the Limitation Act. 1926 M. 385=91 I.C. 485 ; 8 B. 257 (*Contra* in 40 I.C. 605, not good law now.) Where possession has once been delivered to the auction-purchaser, the order confirming delivery of possession cannot be set aside merely because the application for possession was made after the prescribed period of limitation. 89 I.C. 196. A certified purchaser who is dispossessed may sue for possession within 12 years from the date of dispossession. 17 W.R. 429. A suit for actual possession, when the symbolical possession is given and the actual possession remained with the judgment-debtor may be brought within 12 years from the date of granting such formal possession. 19 A. 499 ; 4 C. 870 ; 25 B. 275 ; 73 I.C. 220. The period may be extended in case of fraud, but not on any other ground of hardship etc. 22 I.C. 497.

APPEAL.—No appeal lies against an order under O. 21, r. 96. 18 A. 36 ; 31 A. 88 ; 1 Pat. L.J. 232 F.B. ; 31 C. 737 ; 18 C.W.N. 27 ; 19 C.W.N. 835. A contrary view is taken in Bombay and Madras that an appeal lies. 35 B. 452 ; 44 B. 997. (See also 27 C. 34 ; 27 C. 709) ; 90 I.C. 952=(1925) M.W.N. 577. But see 26 M. 740 and 28 M. 87.

III.—RESISTANCE TO DELIVERY OF POSSESSION.

RESISTANCE OR OBSTRUCTION TO POSSESSION OF IMMOVEABLE PROPERTY.—(1) Where the holder of a decree for the possession of immoveable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction.

(2) The Court shall fix a day for investigating the matter and shall summon the party against whom the

application is made to appear and answer the same. (O. 21, r. 97).

RESISTANCE OR OBSTRUCTION BY JUDGMENT-DEBTOR.—Where the court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment-debtor or by some other person at his instigation, it shall direct that the applicant be put into possession of the property and where the applicant is still obstructed or resisted in obtaining possession, the Court may also, at the instance of the applicant order the judgment-debtor, or any person acting at his instigation to be detained in the civil prison for a term which may extend to thirty days. (O. 21, r. 98.)

RESISTANCE OR OBSTRUCTION BY *BONA FIDE* CLAIMANT.—Where the Court is satisfied that the resistance or obstruction was occasioned by any person (other than the judgment-debtor) claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment-debtor, the Court shall make an order dismissing the application. (O. 21, r. 99.)

DISPOSSESSION BY DECREE-HOLDER OR PURCHASER OF ANY PERSON OTHER THAN THE JUDGMENT-DEBTOR.—(1) Where any person other than the judgment-debtor is dispossessed of immovable property by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the Court complaining of such dispossession.

(2) The Court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same. (O. 21, r. 100.)

***BONA FIDE* CLAIMANT TO BE RESTORED TO POSSESSION.**—Where the Court is satisfied that the applicant was in possession of the property on his own account or on account of some person other than the judgment-debtor, it shall direct that the applicant be put into possession of the property. (O. 21, r. 101.)

RULES 99 AND 101 DO NOT APPLY TO TRANSFERS PENDENTE LITE.—Nothing in rules 99 and 101 shall apply to resistance or obstruction in execution of a decree for the possession of immoveable property by a person to whom the judgment-debtor has transferred the property after the institution of the suit in which the decree was passed or to the dispossession of any such person. (O. 21, r. 102.)

ORDERS CONCLUSIVE SUBJECT TO REGULAR SUIT.—Any party not being a judgment-debtor against whom an order is made under rule 98, rule 99 or rule 101 may institute a suit to establish the right which he claims to the present possession of the property; but, subject to the result of such suit (if any) the order shall be conclusive. (O. 21, r. 103.)

APPLICABILITY OF THE RULES.—S. 48 of the Presidency Small Cause Courts Act applies the provisions of the C. P. Code to proceedings under Chapter VII and the language of it is wide enough to include a power to act under O. 21, r. 98, and remove an improper obstruction to the carrying out of its orders in ejectment. 45 M. L. J. 66—73 I. C. 985; O. 21, r. 97, applies to a decree for possession under the Specific Relief Act, S. 9. 1926 M. 353—92 I. C. 61.

SCOPE AND OBJECT OF RULES 97—103.—The object of rules 97 and 98 is to protect the decree-holders and the auction-purchasers in execution of decrees, 13 W. R. 466; while rules 100 and 101 protect the interests of third parties who are dispossessed. These rules provide a summary remedy in execution proceedings. A decree-holder or auction-purchaser may apply within 30 days under these rules or bring a regular suit. If he fails to avail himself of the summary remedy under r. 97, he is not deprived of his right to bring a regular suit against the party obstructing execution of the decree. 8 B. 602; 47 O. 907; 57 I. C. 177; 8 B. 481; 1885 P. J. 86. The remedy for obtaining possession of the property given by these rules to the purchaser at an execution sale does not preclude him from bringing a regular suit therefor before exhausting the remedy under the rule. The remedies are concurrent, 14 C. 644; (followed in 29 A. 463; 31 M. 177); see also 9 C. 602; 12 C. 169; 7 W. R. 453; 17 W. R. 429; 5 B. H. O. 139; 8 B. H. O. 219. The auction-purchaser may bring a regular suit for possession against the person, obstructing or to have recourse to a summary remedy by way of an application under r. 97. He is not bound to have recourse to the summary remedy. But if he does so and fails, then the remedy to bring a regular suit is ousted and such a suit must be brought under r. 103 within the period of one year under Art. 11-A of the Limitation Act, 46 A. 693. Acquiescence in the obstruction to a previous attempt to obtain delivery of possession does not prevent the decree-holder from applying again in execution for possession and to obtain it by removal of the said obstruction. (1921) M. W. N. 198; (1919) Pat. 81—49 I. C. 150 F. B.; 13 M. 504; (*contra* in 12 B. 463). O. 21, r. 98, applies only if the Court is satisfied that the obstruction was by the judgment-debtor or by some person at his instigation. 31 I. C. 799. It applies to obstruction by the purchaser from the judgment-debtor after attachment, he being the representative of the judgment-debtor within the meaning of S. 47. 34 M. 450. An application under O. 21, r. 97, cannot be made until the decree-holder or the auction-purchaser has been resisted or obstructed in obtaining possession of the property. 46 A. 693. There is an

alternative remedy of a suit and an application under this rule. 46 A. 693, 8 B. 602; 8 B. 481. This rule is for the benefit of a purchaser at a sale in execution. 13 W. R. 467. The rule is applicable whether the resistance is made by the judgment-debtor or somebody on his behalf, or a third party. 13 W. R. 467; 31 M. L. J. 877; 14 P. R. 1910. The proceedings under O. 21, rr. 97—101, are in execution and not original proceedings and O. 9, r. 13, does not apply to such proceedings. 1926 M. 412=92 I. O. 533.

O. 21, r. 98.—This rule applies when the obstruction is occasioned without just cause by the judgment-debtor or by some person at his instigation. 47 C. 907; 16 B. 711; 31 I. O. 799; 8 W. R. 293. An application to remove obstruction caused by a purchaser from the judgment-debtor after the attachment of the property falls under O. 21, r. 98; 34 M. 450.

JUST CAUSE.—Right of an unmarried sister to reside in the family dwelling house till her marriage, is a just cause. 43 M. 635. A resale by the decree-holder purchaser to the judgment-debtor is a just cause. 8 M. L. T. 388.

DECREE FOR POSSESSION.—A decree for partition is a decree for possession within the meaning of this rule. 16 M. 127.

COURT.—Presidency Small Cause Court.—A Small Cause Court has jurisdiction in execution of a decree in ejectment to act under this rule. 93 I. O. 995=45 M. L. J. 66.

Collector.—When a decree is transferred to a Collector for execution, the Court which passed the decree is *functus officio*, but when the Collector has exhausted his powers, all matters are done by the Court which passed the decree. 38 B. 673.

NATURE OF THE ORDER UNDER R. 103.—This rule does not apply unless there is an order under rr. 98, 99 or 101. When the Court declines to pass an order on an application made under r. 97 or r. 100 and leaves the parties to a regular suit, this order does not apply and the bar of limitation under Art. 11-A. of the Limitation Act of one year does not come into force. 27 M. 25. An order under these rules must be one made after investigation. Hence an order dismissing an application under r. 97 or 100, for default of prosecution is not an order under this rule. 34 C. 491; 14 N. L. R. 66; 31 I. C. 444; 41 I. C. 640; 42 P. R. 1909; 11 W. R. 197; (*contra* in 1 Pat. L. T. 659). The scope of an order under r. 103 is not merely the determination of the mere question of possession of the parties concerned but also the establishment of the right or title by which the plaintiff claims the present possession of the property. 44 M. 227; 16 I. O. 741. The order under r. 101 becomes conclusive under r. 103 only so far as the present right to the possession of the property is concerned. It does not affect a plaintiff's right to possession upon redemption. 17 N. L. R. 33=54 I. O. 276. O. 21 r. 103, applies to cases where strangers to the decree are involved, while S. 47 governs cases where the persons concerned are parties to the suit or their representatives. 41 M. L. J. 54=63 I. C. 730. Where an application is dismissed without investigation on the ground of delay, the order is conclusive and must be challenged in a suit under O. 21, r. 103. 45 M. L. J. 690=(1923) M. W. N. 623. When an application for possession of the house in dispute under r. 97 is dismissed under r. 99, the Court has no jurisdiction to direct the person in whose favour the order in question was passed to bring a regular suit to establish his right. Such a suit is not one under r. 103 and is not governed by Art. 11 of the Limitation Act. 1 P. R. 1919. Where no investigation was made, there was no inquiry within the meaning of these rules and the order is not conclusive under r. 103. 34 C. 491; 31 I. O. 441; 42 P. R. 1909. It is only when the summary order under r. 103 was inconsistent with the defeated party's claim that the latter was bound to

bring a fresh suit within one year, otherwise not. 11 B.H.C.174. Where an auction-purchaser applied for possession of the properties sold when he was obstructed by the persons in possession and the Munsiff passed an order for possession and afterwards no attempt was made to obtain possession by the auction-purchaser and the objector remained in possession, it was *held* in a subsequent suit by the auction-purchaser against the persons in possession, brought after three years, that the defendants were not estopped from setting up their title to the property, even though if possession had been given under the order of the Munsiff they would have been bound by it if they did not bring a fresh suit within one year. 23 M.L.T. 233=45 I.C. 24. An auction-purchaser's application for delivery of possession of the properties purchased by him was dismissed for default. He filed another application and was put in possession against the resister; then the resister applied for restoration of the property, and the auction-purchaser was deprived of possession. *Held* that a suit by the auction-purchaser was within r. 103 and limitation ran from the date of the order on the resister's application. 15 A.L.J. 420=39 I.C. 797. When an order is passed under these rules for joint possession of the decree-holder with the claimant, such an order is final subject to the result of the suit by the claimant. When the claimant continued in possession and was not evicted the words of r. 103 are wide enough to cover a suit by the claimant to establish his right to sole possession. (1914) M.W.N. 897=27 I.C. 90; 1 L. 57. A mere dismissal in default or for non-prosecution does not amount to an order under these rules. 14 N.L.R. 66. The test whether an order is on merits or not is whether there has been an investigation and the order has been passed on the result of the investigation (*ibid*). An order refusing an applicant relief under these rules is as much conclusive, under r. 103 as an order granting him relief. 42 B. 10. When a judgment-creditor has obtained an order for possession prior to the death of the judgment-debtor there is no necessity for him to bring any other person on the record between the date of that order and the date on which it is executed. An order allowing withdrawal of the application is not an order under these rules. 5 B. 440.

NATURE OF INVESTIGATION UNDER THESE RULES.—The intention of the Legislature in having altered S. 331 of the Code 1877 by the Code of 1882 (and now O. 21, r. 99) was clearly to enlarge the powers of the Courts in the investigation of the claims under the rule. In such an investigation it is competent to the Court to determine finally any question of title arising between the contending parties in connection with their right to possession and the enquiry is not to be confined to mere possession. 14 B. 627; 27 A. 453. The scope of an order under r. 103 is not merely the determination of the mere question of possession of the parties concerned, but also the establishment of the right or title by which the plaintiff claims the present possession of the property. 44 M. 227; 16 I.C. 741. The applicant must prove that he was entitled to possession when he was dispossessed and not merely that he was *bona fides* in possession and not a party to the decree. 6 O.C. 110 (*contra* in 2 A. 94). A person dispossessed by the decree-holder in pursuance of an order of the Court need not in seeking to be restored to possession prove his title. It is enough if he proves his possession. The Court must be satisfied that the applicant was in possession. 14 N.L.R. 66. A Court acting under these rules need not adjudicate upon any question of title and the investigation made by the Court with respect to the possession of the person on his own account and in good faith is sufficient. 1 L. 57; 40 M. 964; 22 I.C. 707=19 C.L.J. 13. It is the duty of the Court to make an enquiry under these rules and to pass orders as it might deem proper under the circumstances. 8 W.R. 79. There is nothing to prevent the claimant from questioning the legality of the decree obtained by the decree-holder against the judgment-debtor. 4 N.W.P. 81. Where the claim put forward by the obstructor was not treated as a suit and no issues were framed nor evidence taken, but the matter was treated as an interlocutory proceedings, the decision could not be *res judicata* in any subsequent proceedings. 72 I.C. 582=

44 M.L.J. 483. In a proceeding under O. 21, r. 101 no question of title can be gone into. 22 I.O. 707 = 19 O.L.J. 13. The Judge should fix a day, hear the evidence adduced on each side and decide the case. 8 W.R. 79. An order passed under the rules becomes conclusive so far as the present right to possession is concerned. 17 N.L.R. 33 = 54 I.O. 276.

WHO CAN APPLY UNDER THESE RULES—R. 97.—The real purchaser of property though the sale certificate may have been issued *benami* in the name of another is entitled to take action under O. 21, r. 97. 31 M.L.J. 877 = 37 I.O. 497.

O. 21, r. 99.—Right of Stranger to suit.—When in execution proceedings property belonging to a stranger is sold and he is ousted and possession given to the purchaser, the stranger has a right to be replaced, although the auction-purchaser's remedy has become time-barred. 60 I.O. 120 (A.). A sub-tenant of a tenant judgment-debtor cannot be proceeded against under O. 21, r. 97 when he was not made a party to the suit in which the decree for possession was passed against the tenant. 47 C. 907. The possession contemplated by O. 21, r. 99 is actual or symbolical possession. If the property is in the actual possession of a tenant the landlord may resist or obstruct and an application lies against him. 25 B. 478. When a consent decree is passed against one of the two defendants, the other defendant is not a judgment-debtor under the rules. 30 M. 72. The Court should make a summary inquiry into the claims of the third party that he is in possession in good faith. 14 P.R. 1910; under the old Code the Court had to register the third party's claim as a suit between decree-holder as plaintiff and the objector as defendant and to try and determine that suit. But the law is changed now.

O. 21, r. 100.—This rule does not apply when the execution is transferred to the Collector. A person dispossessed or ousted wrongfully by the Collector's order under S. 72, C.P. Code, should apply to the Collector and not to the Court. 37 B. 498. But the Collector in the C.P. is not invested with power to dispose of objections to dispossession in execution of a decree under this rule. 78, I.O. 580. A claimant who has an interest in the land of which possession has been given in execution of a decree against a member of a joint Hindu family or otherwise and who is affected by the delivery of possession can apply under this rule on his own account. 1923 N. 25; 18 O.W.N. 595; 3 M. 81; 68 I.O. 174 (*contra* in 17 B. 718). Only the *bona fide* purchasers may apply. 1923 P. 308.

Judgment-debtor.—In rr. 100 and 101 the expression includes the representative of the judgment-debtor and all persons who are bound by the decree against the judgment-debtor and by the sale in execution of that decree. The purchaser of a portion of a holding sold in execution of a decree obtained under S. 148 (A) of the B.T. Act is bound by the decree and by the sale in execution thereof and cannot therefore apply under rr. 100 and 101. 42 I.O. 526 = 2 Pat. L.J. 478; 43 I.O. 969 = 3 Pat. L.J. 579; *contra* in 65 I.O. 476 by the Calcutta High Court. A person who is in joint possession of the property with the judgment-debtor can maintain an application under this rule. 20 I.O. 253 = 18 O.W.N. 695; 75 I.O. 856 = 5 Pat. L.J. 107. A usufructuary mortgagee in possession is entitled to apply to the Court under O. 21, r. 100. 70 I.O. 306 = 1 Pat. 159. A purchaser *pendente lite* is a person bound by the decree and therefore comes within the definition of judgment-debtor under O. 21, r. 98. 1925 C. 1249. An order against a third person who offers resistance at the instigation of third parties, does not come under these rules. 88 I. O. 104; 2 O.W.N. 911.

O. 21, r. 102.—But proceedings can be taken under r. 98 against a purchaser from a judgment-debtor pending attachment on the ground that such a purchaser is a representative of the judgment-debtor within the meaning of S. 146 and that r. 95 lays down proceedings to be taken against such a person. 34 M. 450. The provisions

of O. 21, r. 101, etc., do not apply to a person who was a transferee *pendente lite* and therefore he cannot be put in possession as prayed for by him. 42 I.C. 523=6 L.W. 568 ; 39 O. 220.

O. 21, r. 103.—Any party.—The words "any party" refer to any party to the petition under rr. 97 and 100 and not to the decree under execution. 43 M. 696. This rule applies only when an order is made under r. 98, 99 or 101. 69 I.C. 557=1923 L. 45.

DISPOSSESSION.—The person in possession cannot be said to be dispossessed of immoveable property by the decree-holder or auction-purchaser under r. 100, if merely symbolical possession is delivered to the latter persons and hence the former cannot apply under this rule. 30 C. 710. Where a person is in possession of property through his tenant the dispossession under this rule will be effected only when the tenant is ousted from the property by the delivery of actual possession to the decree-holder or purchaser. 33 C. 487. The word possession in this rule includes constructive and symbolical possession as well as actual physical possession. 3 Bom. L.R. 58 ; 25 B. 478.

USE OF REASONABLE FORCE IN DISPOSSESSION.—A reasonable degree of force may be used in order to effect the removal of persons bound by the decree and refusing to vacate. 42 O. 313.

LIMITATION FOR APPLICATION BY THE PERSON DISPOSSESSED.—Art. 165 applies to an application, by a person dispossessed of immoveable property, under O. 21, r. 100, and the period of limitation is 30 days as provided in the article. See Art. 165 of the Limitation Act.

LIMITATION FOR APPLICATION.—An application under O. 21, r. 97, is to be filed within 30 days from the resistance or obstruction complained of under Art. 167 of the Limitation Act. 22 A.L.J. 626 F.B ; 5 Bom.H.C.R. 39. An application filed after one month is illegal. 22 M.L.J. 664. Where a warrant issued for possession is returned unserved and a second warrant is issued, time runs from the date of the second obstruction. 5 M. 113. If the complaint as to resistance is time-barred, an objection on that ground may be taken in appeal against the order on the complaint. 21 B. 392. If no application is made from the resistance to possession within 30 days and afterwards resistance is offered, another application for possession within 30 days of such resistance is within time. 5 M. 113 ; 13 M. 504 ; 18 A. 233 ; 1 I.C. 785. But see 26 A. 365. The period of limitation under this article can be extended by the Court, even on the ground of minority. 7 A. 31 ; 11 W.R. 259 ; 21 M. 494 ; 11 B. 473. The period of limitation for an application under O. 21, r. 98 complaining against a judgment-debtor for obstruction to the execution of a warrant for possession, commences to run from the date of obstruction or resistance complained of. 5 M. 113 ; 18 A. 233.

SUITS UNDER O. 21, R. 103.

PROOF REQUIRED BY THE PLAINTIFF.—An unsuccessful claimant suing under O. 21, r. 103 will ordinarily be entitled to succeed on his showing the fact of his possession on the date of the order only if the decree-holder fails to prove a subsisting title in him carrying with it the right to possession. A person in actual possession has a possessory title against the world and cannot be dispossessed by the true owner and those claiming under him. A decree-holder may establish his right to the present possession at the date of the summary order. The scope of the suit is the same whether the order was passed under r. 98, 99 or 100. 60 I.C. 109=39 M.L.J. 626 ; 69 I.C. 557=1923 L. 145. A suit under r. 103 is one to establish present possession of property and the right can be established by the plaintiff without showing actual possession at the time of summary order against him. 44 M. 227. The onus of proving a

subsisting title to land is on the party who is out of possession, and the fact that a party in possession is driven to institute a suit under the provisions of O. 21, r. 103 does not shift the burden of proof on him. 82 I.C. 861. A suit contemplated by O. 21, r. 103 is one by a person kept out of possession of property purchased in execution and claiming possession under his purchase. 1926 O. 377=90 I.C. 575.

LIMITATION FOR SUITS UNDER O. 21, R. 103.—The period of limitation prescribed for a suit under r. 103 is one year from the date of the order under the rule under Art. 11-A of the Limitation Act. 103 P.L.R. 1916=36 I.C. 211 ; 17 O. 260 ; 26 B. 730 ; 1 L. 57. Even where the question of title has been decided the period of limitation is under Art. 11-A of the Limitation Act, 1908, one year. 15 O. 521 P.O. Where an application under the rules is dismissed under O. 21, r. 99, the Court has no jurisdiction to direct the person in whose favour the order is made to bring a regular suit to establish his right, and a suit by such a person is not governed by Art. 11 of the Limitation Act. 1 P.R. 1919 ; 31 I.C. 444.

Starting Point of Limitation.—Where an auction-purchaser's application for delivery of possession of the property purchased by him after removal of obstruction on the part of one R was dismissed for default and on another application filed by him for the same purpose he was put in possession but he was dispossessed of it in pursuance of an order on an application by R for restoration of possession, *held* that a suit by the auction-purchaser under r. 103 was governed by Art. 11-A of the Limitation Act, the starting point being the date of the order on R's application and not that of the order on the auction-purchaser's first application. 15 A.L.J. 420=39 I.C. 797. The rule of one year will apply only when the order is made after enquiry as a result of an investigation. 68 I.C. 524=26 O.W.N. 853; 45 M.L.J. 690 ; *contra held* in 41 M. 985 F.B. ; 45 O. 785 ; 40 A. 325 ; 58 I.C. 37=5 Pat. L.J. 652 ; and *held* that Art 11-A is sufficiently wide to cover cases brought under this rule. Where the applicant withdraws his application with the leave of the Court and the Court dismisses it for want of prosecution the article does not apply. 34 C. 491. Art. 11-A does not apply to a case in which the plaintiff bases his claim on subsequent dispossession by the defendant and not on the dispossession which he alleged in his application under the rules. 76 I.C. 407=38 O.L.J. 150.

COURT-FEES IN SUITS UNDER O. 21, R. 103.—When the purchaser's application for removal of resistance is dismissed, then the claim sought by the purchaser is a declaration of title as well as for possession and amounts to a prayer for a declaratory decree and consequential relief and the proper Court-fees is that payable under cl. iv (a) of S. 7, Court-Fees Act. 22 A. 384. The Court fee on a suit brought under O. 21, r. 103 is Rupees ten only even though possession may be asked for. 9 B. 20.

PARTY AGAINST WHOM AN ORDER IS MADE.—An order made against an applicant is as much under these rules as one made in his favour, 42 B. 10. Where in execution of a decree a decree-holder brings his own property to sale as that of the judgment-debtor and then prefers objection to the possession of the same to the purchaser and such objection fails his remedy is only by way of a suit under the rule and not an application under S. 47. 70 I.C. 569=15 L.W. 272.

AN ORDER UNDER R. 103 IS CONCLUSIVE SUBJECT TO A SUIT.—The conclusive effect of an order under O. 21, r. 103 attaches to it even when the party against whom it is made is not the plaintiff but a defendant in the suit in which it is set up as a bar. 38 I.C. 216. The order made under these rules is conclusive subject to a suit under O. 103. The mere fact that there was already a suit pending regarding the title to the property does not absolve the party from the obligation to bring the

proper suit to contest the validity of an order passed under these rules. 75 I.C. 814 = (1924) M.W.N. 359. An order under the rules does not affect a party's right to possession upon redemption, as such a right is not a right to the present possession of the property. 54 I.C. 276. A partition suit by a purchaser of a co-parcener's interest in a joint Hindu family property is not barred by a prior decision against him in a suit under O. 21, r. 103. The cause of action in a suit under O. 21, r. 103 is the adverse order in claim proceedings, and in a partition suit it is the purchase of undivided interest of a Hindu co-parcener. 1926 M. 683 = 23 L.W. 551.

RESISTANCE.—The provisions of r. 97 come into operation only when delivery of possession has been ordered by the Court or on attempt to obtain possession has been made by the decree-holder out of Court. Unless either of these contingencies has occurred it cannot be said that the auction-purchaser or the decree-holder has been resisted or obstructed in obtaining possession. 46 A. 693. The resistance or obstruction contemplated in O. 21, r. 97 is some overt act of resistance or obstruction to the giving of possession by some person who is present at the time. 82 I.C. 865. Where in execution of a decree for possession of immoveable property a person other than the judgment-debtor and not bound by the decree is found in its possession and refuses to obey the warrant, it amounts to resistance within the meaning of this rule. 45 P.W.R. 1910 = 6 I.C. 649. Where a Commissioner is appointed to partition the property and to put the person entitled in possession of his share resistance to such Commissioner is such a resistance as is contemplated by these rules. 7 C.L.J. 98.

STRANGERS CLAIMING TO BE IN POSSESSION ON THEIR OWN ACCOUNT.—**Possession of unmarried sisters of a Hindu.**—The unmarried sisters of a Hindu are entitled to residence in the family dwelling-house until they are married, and if the house be sold in execution of a decree for debts incurred by him or his legal representative they can resist the auction-purchaser under r. 99 from ousting them from the portions in their actual occupation. 43 M. 635.

Government's right to come in after grant of Patta.—When Government grants a patta for land it ceases to have possession of any kind whatsoever and the fact that the charge is made for Jamma Bhogam in addition to the assessment does not affect the matter and consequently the Government is not entitled to come in under O. 21, r. 99. 21 M.L.J. 407; 21 M. 505. The possession of the mortgagee in possession is on his own account. 2 A. 94; 22 I.C. 707 = 19 C.L.J. 13.

A sub-tenant is not in possession on his own account. 23 Bom. L.R. 1316 = 46 B. 887; 46 B. 526. When a lessee granted a sub-lease of the premises against a covenant in the lease not to sub-let, the lessor cannot, in execution, get possession from the sub-tenant. He must bring a separate suit for possession against the sub-tenant. 47 C. 907.

An auction-purchaser under a simple money decree is a representative of the judgment-debtor for the purposes of O. 21, r. 98 and proceedings can be taken against him under S. 146, O. P. Code. 59 I.C. 894 = (1920) M.W.N. 787.

Possession joint with the Judgment-debtor.—A claimant under O. 21, r. 100, who has a joint possession with a judgment-debtor can apply under the rule and his joint interest with the judgment-debtor cannot prevent him from claiming in good faith in respect of his own share. The effect of an order in favour of the claimant will be to place him in joint possession with the execution purchaser. 18 C.W.N. 695 = 20 I.C. 253 (3 M. 81, followed).

A member of a joint Hindu family cannot be said to be in possession of any particular portion of the joint property on his own account. His possession is the possession of the family. 17 B. 718.

When a sixteen annas landlord purchases a holding in execution of a rent decree, obtained against the recorded tenant, a purchaser from the recorded tenant, who has purchased without the landlord's consent has no right in the absence of a custom of transferability of holdings without the landlord's consent to make a claim under O. 21, r. 100. 3 Pat. L.J. 579=43 I.C. 969.

A person who is in joint possession of the property must be deemed to be in possession on his own account and can maintain an application under r. 100. The Court cannot go into the question of benami in order to determine whether a person is or is not in possession of the property on his own account. 5 P.L.T. 107=83 I.C. 599.

A party to a suit against whom no decree has been passed, is not a judgment-debtor and when an obstruction is caused by such a person his claim should be enquired into under this rule. 30 M. 72.

A *pro forma* defendant is not a judgment-debtor under this rule. 14 P.R. 1910.

An objection by some members of the family, to which the property belonged but who were not made parties to the suit, is to be enquired into under r. 99. 14 I.C. 282.

A mortgagee from the judgment debtor after attachment is a representative of the judgment-debtor and does not hold the property on his own account under O. 21, r. 99. 17 M.L.J. 321; 20 M. 378; 28 C. 492.

A person in joint possession with the judgment-debtor as a member of the family or otherwise in his own interest and in possession is entitled to interfere under O. 21, r. 101. 18 C.W.N. 695=20 I.C. 253; 3 M. 81; 75 I.C. 856 (*contra* in 17 B. 718).

Transferees *pendente lite* do not hold on their own account. 42 I.C. 523=6 L.W. 568. A party to a mortgage suit who sets up a paramount title and is discharged from the suit, there being no decree in his favour or against him is not a party to the suit, and can object to the delivery of possession of property under r. 100. 15 N.L.R. 146.

APPEAL.—An appeal lies against an order under O. 21, r. 100, when the question is between parties to the suit or their representatives. 41 M.L.J. 54=(1921) M.W.N. 483=63 I.C. 730. An order under r. 101 is final between the parties and not appealable. 57 P.R. 1917; 17 A. 222. The r. 103 does not bar a right of appeal which is otherwise available under S. 47. 39 M.L.J. 603; 29 M.L.J. 629; 43 M. 696; (1921) M.W.N. 487; *contra* held in 42 M. 10; 91 P.W.R. 1917=101 P.L.R. 1917.

REVISION.—An order under O. 21, r. 98 cannot be rectified in revision because a remedy by suit exists under O. 21, r. 103. 129 P.L.R. 1911=10 I.C. 183. Where the Court ordered possession to be given not in accordance with the sale certificate, the Court was held to have acted illegally and without jurisdiction and the High Court has power to interfere in revision. 18 A. 163; 80 P.L.R. 1901. An order under r. 101 is liable to revision. 6 A. 172 17 A. 222; (*contra* in 10 I.C. 183=129 P.L.R. 1911). But the order should not be set aside in revision if there has been a great delay. 18 W.R. 87.

INHERENT POWER OF COURT TO ORDER DELIVERY OF POSSESSION.—Although the O. P. Code makes no express provision for the case of resistance to delivery of possession to the decree-holder by a claimant other than the judgment-debtor who is not in possession and who makes a *bona fide* claim to the possession of the property, yet under S. 151 of the Code the Court has inherent power to order possession to be delivered to the decree-holder. 6 I.C. 120=14 C.W.N. 639.

O. 9, R. 18 AND AN ORDER UNDER THESE RULES.—O. 9, r. 13 does not apply to proceedings under rr. 100 and 101. An *ex parte* order under the rules cannot be set aside by the executing Court. 41 C. 1

APPLICATION FOR RESTORATION.—An application for restoration of the application dismissed for default is maintainable under S. 141 of the O. P. Code. 23 Mys. C.O.R. 164.

WRONGFUL DELIVERY OF POSSESSION.—Irregularity in the delivery of possession cannot be considered but as material. 20 P.R. 1917 ; 58 P.W.R. 1917 = 41 I.C. 752 ; 84 I.C. 733 = 1925 L. 264. Where no copy of the hookamnana was fixed on any place on the land in dispute the possession given to the decree-holder cannot be called as legal possession under the rule. It is essential that all the requirements of the rule should be carried out. 15 W.R. 99. When the provisions of O. 21, r. 36 have not been complied with, and the property is in the hands of the tenants, the possession is not legally transferred. 41 I.C. 752. Failure to affix a copy of the warrant for delivery of possession, to the place vitiates the symbolical delivery. 74 I.C. 1 = 1923 L. 693. When on obtaining delivery of possession of immoveable property under O. 21, r. 95 the auction-purchaser dispossessed a tenant of the judgment-debtor, *held* that the auction-purchaser not having proceeded under O. 21, r. 96 the dispossession was not in due course of law and a suit under Specific Relief Act was maintainable. 12 C.W.N. 694.

CASES OF SYMBOLICAL POSSESSION.—Symbolical possession is delivered only in cases where the party in actual possession is entitled to remain in such possession as in cases of delivery under O. 21, r. 96 and should not be confounded with cases where a party is entitled to actual possession but obtains only what is called a paper delivery, i.e. when he gets no possession at all. 44 I.C. 839 ; 72 I.C. 318 = 6 N.L.R. 157. Symbolical possession is delivered in the cases mentioned in O. 21, rr. 35 (2), 36 and 96. 72 I.C. 318 = 1923 N. 237.

CASES OF ACTUAL OR KHAS POSSESSION.—The possession contemplated by O. 21, r. 35 (1) and O. 21, r. 95 is actual possession.

EFFECT OF DELIVERY OF SYMBOLICAL POSSESSION.—Delivery of symbolical possession does not amount to dispossession as against third parties ; and neither the provisions of O. 21, r. 103 nor Art. 11 of the Limitation Act are a bar to the plea being set up. 24 I.C. 771 = 15 M.L.T. 163 ; 23 I.C. 311 ; 45 I.C. 606 = 21 O.C. 70 ; 10 C. 993 ; 21 A. 269 ; 36 C.L.J. 472. When symbolical possession is given to an auction-purchaser under O. 21, r. 96 while the property is in the possession of the tenant, a person who claims a title to the land by gift can bring a suit merely for a declaration of title without a prayer for possession against the auction-purchaser. 18 M. 405 ; 26 C. 845. Symbolical possession does not amount to dispossession of the original possession so as to entitle him to apply under rr. 97—103. Delivery of symbolical possession is effective as actual possession against the judgment-debtor and not against third persons who were not parties to the decree. 23 I.C. 811 ; 10 C. 993 ; 5 C. 584 ; 16 C. 530 ; 24 I.C. 771 = 15 M.L.T. 163 ; 45 I.C. 606 = 21 O.C. 70. Symbolical possession given in a case where actual possession ought to be given operates as actual possession against the judgment-debtor and other persons bound by the decree. It amounts to actual possession as against the judgment-debtor or his representative. The reason is that such possession is obtained through an officer of the court and by process of law and the judgment-debtor must be taken to be a party to the proceedings relating to the taking of possession. 24 C. 715 ; 56 I.C. 676 ; 86 I.C. 439 = 1925 M. 1140 ; 175 M.L.J. 598 ; 71 I.C. 999 = 1923 L. 693 ; 89 I.C. 596 ; 3 P.L.T. 628 ; 46 B. 710 ; 27 C.W.N. 24 ; 5 C. 584 ; 16 C. 530 ; 4 C. 870 ; 24 C. 175 (*Contra* in 43 A. 520). But the delivery of such symbolical possession does not affect persons impleaded as parties to the suit against whom, however, there is no decree for possession. 24 Bom. L.R. 494 = 68 I.C. 91 ; 36 B. 273.

Adverse possession.—Symbolical possession is sufficient to interrupt adverse possession where the person setting up adverse possession was a party to execution proceedings in which the symbolical possession was given. 43 I.C. 268 P.O.—34 M.L.J. 97 P.O.; 16 O. 530; 4 O. 870; 24 O. 175; 1923 O. 138; 5 C. 584; 27 O.W.N. 27; 17 M.L.J. 498; 28 A. 722; 46 B. 712 F.B.; 20 Bom. L.R. 502 P.O.; 1926 L. 37—26 P.L.R. 832—90 I.C. 41 (*Contra* in 36 B. 373; 18 B. 37); 70 P.L.R. 1910. Formal possession obtained by an auction-purchaser of the undivided share saves limitation not only as against the judgment-debtor but also as against the co-sharer with whom he is in joint possession. 3 A.L.J. 659—A.W.N. (1906) 278. When possession has been delivered to an auction-purchaser under r. 95 or r. 96, he gets a fresh start for the computation of limitation. But a mere formal delivery of possession does not give such a start. 43 A. 520. When the land purchased at a sale in execution is in the adverse possession of a third person, symbolical delivery to the auction-purchaser is not effective in saving limitation. 21 I.C. 765. Delivery of symbolical possession under O. 21, r. 96 puts an end to limitation so far as a party to the proceeding is concerned. 7 C. 418; 10 M. 17; 5 B. 554.

Limitation for possession.—The period of limitation begins from the date of subsequent dispossession, when symbolical possession is given, against the judgment-debtor or his representative and not from the date of the sale. 5 C. 584 F.B.; 16 O. 530 F.B. A purchaser at an execution sale must apply for possession of the property purchased at an auction sale within 3 years from the date on which the certificate was issued and granted to him under Art. 178 old Act of the Limitation Act. 8 B. 257. When the suit for actual possession is instituted against a third party claiming to be in possession of the property on his own account no regard is to be had at all to the symbolical possession of the plaintiff in determining the point of limitation, and the period of 12 years is to be reckoned from the date on which the possession of such third party became adverse as against the judgment-debtor. 19 B. 620; 10 O. 993.

For the purposes of Penal law :—A person who has obtained formal possession of certain property in execution of a decree must be deemed to be in possession of such property for the purposes of penal law. 25 Cr. L.J. 917; 81 I.C. 533.

PROOF OF SYMBOLICAL POSSESSION.—The delivery of possession in execution of a decree is an act of a tribunal and a report made to the court by an officer of the Court that its order has been carried out, and possession has been delivered to the decree-holder, which report is preserved as one of the court records, is a public document within the meaning of S. 74 of the Evidence Act and can be proved by the production of a certified copy as permitted by S. 77 of the same Act. 25 O.L.J. 917—81 I.C. 533.

DELIVERY OF ACTUAL POSSESSION—EFFECT OF.—After possession has been given to the decree-holder under O. 21, r. 95 the judgment-debtor's possession is only that of a trespasser. 66 I.C. 817—3 Pat. L.T. 335.

SEPARATE SUIT FOR DELIVERY OF POSSESSION BY THE AUCTION-PURCHASER.—An auction-purchaser, whether he is a decree-holder or a stranger can maintain a suit irrespective of the remedy provided by r. 95 and S. 47 does not bar such a suit. 31 A. 82 F.B.; 40 A. 214; 1 Pat. L.J. 232; 3 Pat. L.J. 571; 4 Pat. L.J. 716; 8 P.R. 1918; 121 P.R. 1919; 41 I.C. 891; 44 B. 977; 18 O.O. 375; 9 C. 602; 12 C. 169; 14 O. 644; 1 O.W.N. 658; 6 L.L.J. 749; 19 O.W.N. 835. According to the Madras High Court where the purchaser is the decree-holder, he cannot maintain a suit. 25 M. 629; 26 M. 740; 28 M. 87; (1912) M.W.N. 513; 44 M. 483; 43 M. 696; 41 M. L.J. 126. A similar view is taken in Nagpur Court. 44 I.C. 978; 44 I.C. 569. The decision of the Calcutta and Bombay High Courts in 27 C. 31, 31 O. 737 18 O.W.N. 27, 35 B. 452 have been altered by the recent decisions quoted in 44 B. 977 and

50 I.C. 299 (C) ; 49 I.C. 137 = 29 L.L.J. 48 ; 19 C.W.N. 885. See also *supra* in "Scope of rules 97—103." The auction-purchaser has two remedies for recovery of possession first, by an application under O. 21, r. 95, and second, a separate suit for possession ; for which the period of limitation is 12 years, 89 I.C. 134. When a decree-holder or auction-purchaser is offered resistance to delivery of possession, he may file an application under O. 21, r. 97 or bring a separate suit, 46 A. 693 ; 86 I.C. 286 = 21 L.W. 842. 8 B. 602 ; 1885 P.J. 86 ; 8 B. 481 ; 90 I.C. 952. A suit by the purchaser is governed by Art. 137 of the Limitation Act.

SUIT TO RECOVER DEBT ATTACHED AND SOLD.—Where in a suit to recover the amount of a debt purchased in execution of a decree it is found that there are material discrepancies between the plaint claim and the claim as indicated in the attachment proceedings, and the plaintiff sought to let in evidence to explain the discrepancies so as to identify the debt, *held* that in such cases only reasonable amount of certainty is all that can be expected, having regard to the knowledge and circumstances of the plaintiff. 42 I.C. 690 = (1917) M.W.N. 879.

DISPOSSESSION AFTER POSSESSION IS DELIVERED TO THE DECREE-HOLDER.—When the decree-holder put in possession of the property in execution is dispossessed by a stranger who has no right to it, his remedy is by way of criminal prosecution or a suit for damages, 70 I.C. 755 = 1923 M. 25.

PENALTY FOR RESISTANCE TO EXECUTION.—Where the Court is satisfied that the holder of a decree for the possession of immoveable property or that the purchaser of immoveable property sold in execution of a decree has been resisted or obstructed in obtaining possession of the property by the judgment-debtor or some person on his behalf, and such resistance or obstruction was without any just cause, the Court may, at the instance of the decree-holder or purchaser, order the judgment-debtor or such other person to be detained in the civil prison for a term which may extend to thirty days and may further direct that the decree-holder or purchaser be put into possession of the property. (S. 74).

SCOPE.—This section provides for penalty in the case of resistance to possession of immoveable property. The words "without prejudice to any penalty to which such judgment-debtor or other person may be liable under the Indian Penal Code or any other law for such resistance or obstruction" which occurred in S. 330 of the old Code have been omitted from this section, being unnecessary. The penalty provided for by this section is in addition to any other penalty or punishment provided by any other law.

POSSESSION.—The word "possession" includes constructive as well as physical possession such as the possession of a tenant. 25 B. 478 ; 33 C. 487.

CHAPTER VI.

ARREST AND DETENTION.

I.—WHAT DECREES MAY BE EXECUTED BY ARREST AND DETENTION IN THE CIVIL PRISON.

The following decrees may be executed by the detention in the civil prison of the judgment-debtor:—(a) Decrees for the payment of money. (See O. 21, r. 30). (b) Decrees for Specific Moveable Property. (See O. 21, r. 31). (c) Decrees for Specific Performance of a contract or an injunction. (O. 21, r. 32). (d) When the decree merely provides for the satisfaction of the decree out of the property mortgaged, the decree cannot be executed against the person of the judgment-debtor. 11 B. 537.

II.—EXEMPTION FROM ARREST OR DETENTION.

PROHIBITION OF ARREST OR DETENTION OF WOMEN IN EXECUTION OF DECREE FOR MONEY.—Notwithstanding anything in this Part, the Court shall not order the arrest or detention in the civil prison of a woman in execution of a decree for the payment of money. (See S. 56, C. P. Code.)

O. 25, r. 1, provides that on the application of any defendant in a suit for the payment of money, in which the plaintiff is a woman, the Court may at any stage of the suit, order the plaintiff within a time fixed by it to give security for the payment of all costs incurred or likely to be incurred by any defendant, if it is satisfied that such plaintiff does not possess any sufficient immovable property within British India.

The necessity of this provision has arisen from the provision of S. 56, C. P. Code.

SUITS FOR THE PAYMENT OF MONEY.—Suits which are not exclusively for the payment of money, but which will result in a decree for the payment of money on the relief sought are suits for the payment of money. 17 C. 610; 23 B. 100. In execution of a decree except for money decree, women are liable to arrest if so provided. (1 B L.R. 31 F.B.).

WRONG ORDER OF IMPRISONMENT.—When a wrong order for imprisonment was passed against a woman, an objection to the effect that she should have taken the objection to arrest when she was arrested and brought before the judge and that her omission to do so should be deemed a waiver of her rights of exemption from arrest, cannot stand, on the ground that it was the duty of the Court to consider on review, however late the application might have been, the nature of the order. 12 B. 228.

PARDANASHIN LADY.—No woman who, according to the customs and manners of the country, ought not to be compelled to appear in public, shall be deemed to be exempted from arrest in execution of civil process in any case in which the arrest of women is not prohibited by the C.P. Code. (S. 132 (2).)

EXEMPTION FROM ARREST OF JUDGE, MAGISTRATE, Etc.—Section 135 provides for such cases and runs as follows:—

(1) No Judge, Magistrate or other judicial officer shall be liable to arrest under civil process while going to, presiding in, or returning from, his Court.

(2) Where any matter is pending before a tribunal having jurisdiction therein, or believing in good faith that it has such jurisdiction, the parties thereto, their pleaders, mukhtars, revenue agents and recognised agents, and their witnesses acting in obedience to a summons, shall be exempt from arrest under civil process, other than process issued by such tribunal for contempt of Court, while going to or attending such tribunal for the purpose of such matter, and while returning from such tribunal.

(3) Nothing in sub-section (2) shall enable a judgment-debtor to claim exemption from arrest under an order for immediate execution, or where such judgment-debtor attends to show cause why he should not be committed to prison in execution of a decree.

OBJECT.—The object is to secure the due administration of justice, 4 B. L.R. O.J. 90.

WHILE GOING TO OR ATTENDING AND WHILE RETURNING FROM COURT.—A plaintiff, a native of Patna who had instituted a suit in the High Court of Madras, left Patna on receiving a letter from his solicitors that his presence was required and arrived at Madras on 24th October. The suit came on for hearing on the 27th of October and was adjourned till the 25th of December. The plaintiff was arrested in execution of a decree against him on the 10th of November. It was held that he was privileged from arrest. 4 M. 317; (Disapproved in 32 A. 36; and not followed in 6 A.L.J. 512). A residing in Bombay goes to Benares to file an application to set aside an *ex parte* decree and puts up at a Dak Bungalow in Benares. On the date fixed for the hearing of the application A attends the Court. His application is heard and dismissed. A leaves the Court, returns to the Dak Bungalow and thence proceeds to the railway station and gets a ticket for Allahabad. He is arrested in execution of the *ex parte* decree while actually seated in the train, held that A's arrest

is legal on the ground that A had left the Court and returned to the place where he was staying in Benares and then he left that place and was actually on his way to Allahabad which was not his home. 32 A. 3. The exemption continues during such period as is reasonably occupied in going to, attending at and returning from the Court. 4 M.H.C.R. 145. The privilege from arrest is not lost if the shortest road to home is deviated from and a less crowded and more convenient road is adopted. 5 C. 106. To claim the benefit of S. 135 a judgment-debtor who is arrested must have been under some obligation to be present before the Court at the time of arrest. A judgment-debtor who has been arrested in execution of a decree can be arrested in execution of another decree held by another decree-holder. 83 I.O. 513=47 M.L.J. 678. A defendant is a suit who is summoned and examined as a witness for the plaintiff is entitled to protection from arrest on civil process during the time reasonably occupied in going to, attending and returning from the place of trial. 4 M.H.C. 145. An insolvent discharged and immediately re-arrested on a warrant obtained by a judgment-creditor is not privileged from arrest on being on his way back from Court under S. 135, C.P. Code. 13 M. 150 F.B. A debtor who is released from jail on the ground that the order committing him to jail was illegal may be arrested immediately after his release because he is not returning from Court. 13 M. 150. A defendant who appears in a Court to defend his suit is exempt from arrest under S. 135 of the C.P. Code. A surety for the appearance of the defendant cannot therefore claim to initiate proceedings under O. 38, r. 3, with a view to obtain his discharge on such an occasion; nor does the appearance of the defendant amount to voluntary surrender within the meaning of O. 38, r. 3. 43 M. 272. A defendant in a summary suit under O. 37 is privileged from arrest though he has not obtained leave to defend the suit while going to the Court. 5 C. 106. Even if it be not strictly necessary that there should be a suit coming on for trial or actually proceeding by way of a trial yet, the person claiming the privilege under the section must be coming, staying, or returning in the belief that his attendance was required for the purpose of the trial. 14 B.L.R. App. 13. Where a witness does not believe *bona fide* that his attendance is required he has no privilege (*ibid*). A party against whom a writ is issued for contempt of Court cannot claim privilege from arrest while proceeding to Court for the purpose of attending hearing of the suit. 4 B.L.R. O.C. 90. A party who is before the Court to conduct his own case or to give evidence, should not be arrested while he is before the Court or while leaving the Court house. 43 M. 273; 5 C. 106. If the witness chooses a route home which is not a direct one he cannot claim exemption. 46 A. 663. The fact that the judgment-debtor, when returning from Court stopped in the way to get a petition written for him by a petition-writer does not deprive him of the protection afforded to him by law. 36 I.C. 493=121 P.W.R. 1916. A judgment-debtor who is arrested in execution of a decree and is present before the Court and is arrested under another decree, is not exempted from such arrest under S. 135 C.P. Code, (1924) M.W.N. 781=84 I.C. 513.

COURT.—A defendant while attending an arbitrator appointed by the High Court to take a reference in a suit is privileged from arrest in execution of a decree while so attending. 5 C.L.R. 170.

BROUGHT TO ANY COURT FOR CONTEMPT.—The defendant is not entitled to be released from arrest on the ground that his arrest took place when he was on his way to the Court when he was being brought up in arrest under a writ of attachment for contempt in not having obeyed an order of the High Court directing him to give an account of and pay into Court certain money and property belonging to the plaintiff in that suit. 4 B.L.R.O.C. 90.

CIVIL PROCESS.—S. 135 applies only in cases of writs issued by Courts to which the C.P. Code applies. This section does not apply where a party is arrested under a

writ issued from a Small Cause Court. Questions as to exemption from arrest under writs issued by such a Court are governed by principles of English law which are similar to those provided in S. 135 of the O.P. Code, 5 C. 106. But now under this Code (as also it was under the Code of 1882) such writs are of civil process.

JUDGE.—Judge means the presiding officer of a Civil Court. (S. 2 (8), C.P. Code).

PLEADER means any person entitled to appear and plead for another in Court and includes an advocate, a vakil and an attorney of a High Court. (S. 2, (15) C.P. Code.) A pleader while acting as such in a Court is entitled to immunity under S. 135, C.P. Code. 23 C. 128.

PRINCES. RULING CHIEFS, AMBASSADORS, ENVOYS.—No Prince or Ruling chief whether in subordinate alliance with the British Government or otherwise and whether residing within or without British India, and no ambassador or envoy shall be arrested under this Code. (S. 86 (3).)

PUBLIC OFFICERS.—In a suit instituted against a public officer in respect of any act purporting to be done by him in his official capacity, the defendant shall not be liable to arrest, nor his property liable to attachment otherwise than in execution of a decree (S. 81 and O. 27, r. 8).

The object of the rule is to exempt public officers from arrest before judgment.

INSOLVENT.—The mere fact that the judgment-debtor has made an application for insolvency in execution of one decree against him cannot debar other decree-holders from causing his arrest in execution of their decrees until he has been actually discharged by the Insolvency Court, and a decree-holder is not debarred from pressing his claim by causing the arrest of the judgment-debtor merely because his debt has been scheduled in an application to be declared an insolvent. 9 O.C. 42. Notice may be issued against a judgment-debtor who, in other execution proceedings has made an application to be declared an insolvent. 22 B. 731 ; 84 I.C. 134 = 1924 M. 42. And the Court may prevent his being arrested if sufficient cause is shown. (*ibid*).

UNDISCHARGED INSOLVENT.—An undischarged insolvent is liable to be arrested for debt which was not included in the schedule filed by the insolvent and for which a decree has been subsequently obtained. 16 O. 85. Even after a vesting order has been made a Court can under the rules direct execution by arrest of the judgment-debtor, where protection has been refused by the Insolvent Court. 9 Bom. L.R. 898.

MINORS AND LEGAL REPRESENTATIVES.—Every personal decree does not carry with it a right to arrest the judgment-debtor in execution. There are exceptions as in case of minors, and legal representatives against whom a decree has been passed or is sought to be executed. 65 I.C. 53 = 18 N.L.R. 145.

A GOVERNMENT, being employed in supplying pilots to vessels at the sand heads is exempt from arrest under 21 and 22 Victoria, cl. 126. (Hyde 258). In an action for repairs when the ship had been lost, the Court granted an order for personal arrest of the defendant, the master and the part owner under, S. 80 of Act VIII of 1859. Cor. 123.

JUDGMENT-DEBTOR GIVING SECURITY.—A decree-holder may get the execution of his decree by arrest of the judgment-debtor, although the latter has furnished security for the performance of the decree in pursuance of an order staying execution pending the decision on appeal. 3 Pat. L.W. 20.

III.—DISCRETION OF THE COURT IN ARREST AND DETENTION.

DISCRETIONARY POWER TO PERMIT JUDGMENT-DEBTOR TO SHOW CAUSE AGAINST DETENTION IN PRISON.—(1) Notwithstanding anything in these rules, where an application is for the execution of a decree for the payment of money by the arrest and detention in the Civil prison of a judgment-debtor, who is liable to be arrested in pursuance of the application, the Court may, instead of issuing a warrant for his arrest, issue a notice calling upon him to appear before the Court on a day to be specified in the notice, and show cause why he should not be committed to the Civil prison.

(2) Where appearance is not made in obedience to the notice, the Court shall, if the decree-holder so requires, issue a warrant for the arrest of the judgment-debtor. (O. 21, r. 37.)

SCOPE.—A Court is not bound in every case to issue a warrant. If it believes that the judgment-debtor is not in a fit state of health to undergo imprisonment, it will be acting wisely in issuing a notice to him to show cause. 9 I.C. 746=14 O.C. 536. The fact that the judgment-debtor does not reside within the territorial jurisdiction of the Court is not a sufficient reason for refusing to issue a warrant for his arrest. Such a warrant may be executed within the jurisdiction of the Court issuing it. 44 I.C. 296=3 P. L.J. 95.

PROCEEDINGS ON APPEARANCE OF JUDGMENT-DEBTOR IN OBEDIENCE TO NOTICE OR AFTER ARREST.—(1) Where a judgment-debtor appears before the Court in obedience to a notice issued under O. 21, r. 37, or is brought before the Court after being arrested in execution of a decree for the payment of money, and it appears to the Court that the judgment-debtor is unable from poverty or other sufficient cause to pay the amount of

the decree, or if that amount is payable by instalments, the amount of any instalment thereof, the Court may upon such terms (if any) as it thinks fit, make an order disallowing the application for arrest and detention, or directing his release, as the case may be.

(2) Before making an order under sub-rule (1), the Court may take into consideration any allegation of the decree-holder touching any of the following matters, namely :—

- (a) the decree being for a sum for which the judgment-debtor was bound in any fiduciary capacity to account ;
- (b) the transfer, concealment, or removal by the judgment-debtor of any part of his property after the date of the institution of the suit in which the decree was passed, or the commission by him after that date of any other act of bad faith in relation to his property, with the object or effect of obstructing or delaying the decree-holder in the execution of the decree ;
- (c) any undue preference given by the judgment-debtor to any of his other creditors ;
- (d) refusal or neglect on the part of the judgment-debtor to pay the amount of the decree or some part thereof when he has, or since the date of the decree has had, the means of paying it ;
- (e) the likelihood of the judgment-debtor absconding or leaving the jurisdiction of the Court with the object or effect of obstructing or delaying the decree-holder in the execution of the decree.

(3) While any of the matters mentioned in sub-rule (2) are being considered, the Court may, in its discretion, order the judgment-debtor to be detained in the Civil prison,

or leave him in an custody of an officer of the Court, or release him on his furnishing security, to the satisfaction of the Court for his appearance, when required by the Court.

(4) A judgment-debtor released under this rule may be re-arrested.

(5) Where the Court does not make an order under sub-rule (1) it shall cause the judgment-debtor to be arrested, if he has not already been arrested, and subject to the other provisions of this Code, commit him to the Civil prison. (O. 21, r. 40.)

ADDITIONAL RULE MADE BY THE MADRAS HIGH COURT.—O. 21, r. 40 (5) Proviso.—Provided that in order to give the judgment-debtor an opportunity of satisfying the decree, the Court before making the order of committal may leave the judgment-debtor in the custody of an officer of the Court for a specified period not exceeding ten days, or release him on his furnishing security to the satisfaction of the Court for his appearance at the expiration of the specified period if the decree be not sooner satisfied.

O. 21, r. 40 (6).—No judgment-debtor shall be committed to the Civil prison or brought before the Court from the prison to which he has been committed pending the consideration of any of the matters mentioned in sub-r. (2) unless and until the decree-holder pays into Court such sum as the judge may think sufficient to meet the travelling and subsistence expenses of the judgment-debtor and the escort for the journey to and from the prison. Sub-r. (5) of r. 39 shall apply to such payments.

ACTS OF BAD FAITH.—The acts of bad faith are not limited to acts of bad faith committed by the debtor in his application for discharge, but include acts of bad faith in the manner of incurring his original liability. 2 Ind. Jur. N.S. 91; 2 Ind. Jur. N. S. 93; 7 A. 295; 26 A. 517; 1 Bourke App. 74; (*contra* was held in 1 Ind. Jur. N.S. 8; 3 B.L.R. App. 14; 7 B.L.R. App. 23; 12 B.L.R. App. 12; restricting acts of bad faith to those for procuring his discharge).

UNDUE PREFERENCE.—Undue preference means not merely giving such preference as would be regarded as a "fraudulent preference", but any preference which can be considered unfair to the creditors, 25 Q.B.D. 505. A debtor who gives an unfair preference to one creditor by giving him a large proportion of his property so as to reduce the share of other creditors acts fraudulently. 12 B. 424.

CASES IN WHICH DISCRETION MAY BE USED.—Ordinarily, if for a number of years a decree-holder is active in trying to execute his decree, and if the failure to recover the decretal money is due to the obstruction and bad faith of the judgment-debtor, there would be good ground for ordering arrest. But where there is no bad faith in the conduct of the judgment-debtor and there is no reason whatever to suppose that he wishes to keep the decree-holder out of his money, the Court should grant the judgment-debtor a reasonable time within which to pay the money due under the decree and if during this time the judgment-debtor shows negligence and has not proceeded with necessary vigour, the question whether or not he deserves arrest should be reconsidered. 246 P.L.R. 1911=11 I.C. 848. When arrest in execution has not specifically been objected to in lower Court, the High Court will not interfere in

revision, 8 W.R. 318. Where all the moveable and immoveable property of the judgment-debtor had been sold in execution of decrees obtained by other persons and he is not able to pay off the whole or any part of the decretal debt, it would be improper to order his imprisonment. 4 L. L.J. 266=1923 L. 259. It is in the discretion of the Court to refuse execution at the same time against the person and property of the judgment-debtor. 7 B. 301. After an infructuous execution against the judgment-debtor's property, the Court is bound, upon application made, to issue execution against his person, and the burden of proof should be put on the debtor when arrested, to show that he has no means of satisfying the debt, and that he has not been guilty of any misconduct. 17 W.R. 165. The combined effect of rr. 37 and 40 is that an executing Court may, the moment an application for arrest of the judgment-debtor is made, direct notice to issue to the latter, notwithstanding any other provisions in the Code, and prevent his being arrested if sufficient cause is shown. The primary consideration must be the interest of the decree-holder. But when his interests are likely to be jeopardized by the granting of any application for time, Courts have no option but to execute the decree. But when without any detriment to the interest of the decree-holder, the granting of time to the judgment-debtor or the surety to pay would not only enable the decretal amount to be paid, but prevent serious loss or ruin to the judgment-debtor or the surety, the Court should stay execution for such time as it thinks reasonable. 20 L.W. 175=84 I.C. 134. See also 21 I.C. 293. It is optional with the judgment-creditor to proceed in the first instance against either the person or the property of the judgment-debtor and the Small Cause Court is bound to issue execution according to the nature of the application. 8 W.R. 282. But the Court may refuse execution against the person and property at the same time or against the person when application for immediate arrest is made at the time of passing of the decree. 8 W.R. 282. An enquiry under S. 59, C. P. Code, as to fitness of health may be made before arrest. 9 I.C. 746=14 O.C. 536. The decree-holder is not entitled to apply for the arrest of the judgment-debtor in the first instance without trying to obtain execution of the decree by other means available to him, i.e., by attachment and sale of his property. 73 P.L.R. 1915=29 I.C. 152; but see now 6 L. 548 *infra*. When the judgment-debtor is arrested and brought before the Court, the burden is on him to show that he is unable from poverty or other sufficient cause to pay the amount of that decree. 7 L.B.R. 239=23 I.C. 833; 2 U.B.R. (1897-1901) 279. The fact that the judgment-debtor does not reside within the territorial jurisdiction of the Court is not a sufficient reason for refusing to issue a warrant for such arrest, although such a warrant can be executed only within the Court's territorial jurisdiction. 44 I.C. 296=3 Pat. L.W. 95. When notice has been issued under r. 37 to the judgment-debtor to show cause why the decree should not be executed by his arrest and imprisonment and he alleges some reason and enquiry is made under O. 21, r. 40, the Court when not satisfied with his reasons is bound under O. 21, r. 40, to cause his immediate arrest. 2 C.W.N. 588. It is the intention of the legislature that the debtors should be compelled to pay their just debts, but it is not reasonable to compel them to do so by means which will deprive them of their means of livelihood, if there is available an alternative method of enforcing payment which will be reasonably fair to the creditor, e.g., payment by instalments. 3 Bur. L.J. 97=82 I.C. 827. The Court may refuse execution by arrest if it is satisfied that the decree was obtained by fraud or without jurisdiction of the Court passing the decree. 15 B. 216. If the judgment-debtor is proved to have sufficient means to pay the decretal amount and to have neglected or refused to pay the same, his release from arrest should be refused. 23 I.C. 833=7 Bur. L.T. 242. The Court has a discretion to disallow the arrest of a lunatic judgment-debtor, and the arrest should not be allowed of a lunatic. 22 B. 961. The Court has no power to refuse execution against the person of the judgment-debtor on the ground that the decree-holder must, in the first instance proceed against the property of the judgment-debtor. 6 L. 548.

IV.—PROCEDURE IN MAKING ARREST AND DETENTION.

(1) A judgment-debtor may be arrested in execution of a decree at any hour and on any day, and shall, as soon as practicable, be brought before the Court, and his detention may be in the civil prison of the District in which the Court ordering the detention is situate, or, where such civil prison does not afford suitable accommodation, in any other place which the Local Government may appoint for the detention of persons ordered by the Courts of such District to be detained :

Provided, first, that for the purpose of making an arrest under this section, no dwelling house shall be entered after sunset and before sunrise :

Provided, secondly, that no outer door of a dwelling house shall be broken open unless such dwelling house is in the occupancy of the judgment-debtor and he refuses or in any way prevents access thereto, but when the officer authorised to make the arrest has duly gained access to any dwelling house, he may break open the door of any room in which he has reason to believe the judgment-debtor is to be found :

Provided, thirdly, that if the room is in the actual occupancy of a woman who is not the judgment-debtor, and who according to the customs of the country does not appear in public, the officer authorised to make the arrest shall give notice to her that she is at liberty to withdraw, and, after allowing a reasonable time for her to withdraw and giving her reasonable facility for withdrawing, may enter the room for the purpose of making the arrest :

Provided, fourthly, that where the decree in execution of which a judgment-debtor is arrested, is a decree for the payment of money, and the judgment-debtor pays the amount of the decree and the costs of the arrest to the officer arresting him, such officer shall at once release him.

(2) The Local Government may, by notification in the Local Official Gazette, declare that any person or class of persons whose arrest might be attended with danger or inconvenience to the public shall not be liable to arrest

in execution of a decree otherwise than in accordance with such procedure as may be prescribed by the Local Government in this behalf. (S. 55.)

LEGAL CHANGES.—(1) Under the present Code, any outer door of a dwelling house may be broken open to effect arrest if the house is in the occupancy of the judgment-debtor.

ARREST ON A HOLIDAY.—An arrest may be made on a holiday. 30 M. 179 ; 4 M.H.C. 62. Arrest on a Sunday is not illegal (*ibid*).

SHALL AS SOON AS PRACTICABLE BE BROUGHT BEFORE THE COURT.—It means on the next sitting. The arresting officer is not bound to take the judgment-debtor to the Court building or to the Judge of the court at his private residence or wherever he may be, or before the nazir. The arresting officer may confine the judgment-debtor, in the interval, in the decree-holder's house, or the judgment-debtor's own house. 30 M. 179.

ENTRY INTO ZENANA.—If an officer, authorised to arrest a *pardanashin* woman, enters into a house, he may break into the zenana if necessary for the arrest. No special order of the court authorising the sheriff to act as above is necessary. 7 O. 19.

SECOND PROVISIO.—"The object of this proviso is to prevent vexatious forms of resistance to execution which constantly obstruct decree-holders in the execution of their decrees." See Report of the Select Committee.

CLAUSE (2).—"This clause is intended to cover the cases of certain persons or classes of persons whose summary arrest might as in the case of railway servants, be attended with danger or inconvenience to the public." See Notes on Clauses by the Select Committee.

IMMEDIATE ARREST.—Where a decree is for the payment of money, the Court may on the oral application of the decree-holder at the time of passing of the decree order immediate execution thereof by the arrest of the judgment-debtor prior to the preparation of a warrant if he is within the precincts of the Court. (O. 21, r. 11.)

V.—PETITION OF INSOLVENCY BY THE ARRESTED JUDGMENT-DEBTOR.

S. 55 (3).—Where a judgment-debtor is arrested in execution of a decree for the payment of money and brought before the Court, the Court shall inform him that he may apply to be declared an insolvent, and that he may be discharged if he has not committed any act of bad faith regarding the subject of the application, and if he complies with the provisions of the law of insolvency for the time being in force.

S. 55 (4).—Where a judgment-debtor expresses his intention to apply to be declared an insolvent and furnishes security, to the satisfaction of the Court that he will within

one month so apply and that he will appear, when called upon, in any proceeding upon the application or upon the decree in execution of which he was arrested, the Court may release him from arrest, and, if he fails so to apply and to appear, the Court may either direct the security to be realised or commit him to the civil prison in execution of the decree.

LEGAL CHANGES.—The conditions of liability are twofold now, petition of insolvency and appearance before the Court, by the judgment-debtor when called upon to do so. See *infra*.

SCOPE.—The pendency of insolvency proceedings neither take away from the executing Court the power of committing the judgment-debtor to civil prison, nor is he entitled to apply to be declared an insolvent. The object of S. 55 (3) is to give the debtor time to apply, but if he has already done so and proceedings are going on, there would be no sense in giving further time. 81 P.L.R. 1910=7 I.C. 351. When the application of the judgment-debtor to be declared an insolvent has once been dismissed and he is re-arrested in execution of a decree against him he is not entitled to a release, under S. 55 (4), on expressing his willingness to apply again to be declared an insolvent, so long as the bar of previous dismissal is not removed by obtaining leave of the court under rule 11 of the Rules under the Insolvency Act. To allow a fresh application without the above rule 11 being complied with, would result in abuse of the process of the court contrary to the provisions of S. 151, C.P. Code. 9 I.C. 121; 75 P.R. 1905. Section 55 (3), C.P. Code, does not entitle the debtor to be declared an insolvent where his application does not comply with the provisions of insolvency law. 21 I.C. 293=25 M.L.J. 545. The section is imperative. 16 P.R. 1909. See 75 P.R. 1905 F.B. And the court is bound to require the judgment-debtor to comply with the conditions given above (*ibid*). A joint application by several judgment-debtors does not lie. 2 C.L.J. 318. Where the judgment-debtor does not furnish security and only applies for insolvency, the court is not bound to release the petitioner and his confinement in jail is not illegal. 59 P.R. 1898. When a judgment-debtor has not expressed his intention to apply to be declared an insolvent when arrested, he may during his imprisonment make an application for the purpose and the court may, pending the hearing of such application release him on his giving security to appear when called upon. 11 C. 451. When a judgment-debtor has been sent to prison he can only be released under S. 58. 18 M. 508. The mere admission of his subsequent application for insolvency under the Insolvency Act does not release him from arrest and detention but upon the order of adjudication being passed, he can be released. 7 I.C. 606. The period of one month is fixed by the Code, and the Court has no power to extend it. 1926 M. 689=(1926) M.W.N. 390; 1926 M. 286=86 I.C. 304.

SMALL CAUSE COURTS.—The clause (4) of S. 55 applies to Small Cause Courts. 2 M. 9.

SECURITY.—(1) **Liability of Surety.**—A surety under S. 55 (4) continues liable until both the conditions, *vis.*, (a) the judgment-debtor applying to be declared an insolvent and (b) the judgment-debtor appearing when called upon to do so in the application or execution proceedings are satisfied. In default of either, the surety remains liable. 1926 M. 286=86 I.C. 304; 22 I.C. 953=15 M.L.T. 224; 34 I.C. 407=(1916) 2 M.W.N. 273; 78 I.C. 447; 58 I.C. 303=(1921) Pat. 19; 46 B. 702; 48 B. 500; 3 R. 187; 86 I.C. 304; 86 I.C. 105=1925 A. 344. A surety bond merely filed in court under S. 55 of the Code for the release of a judgment-debtor arrested in execution of a

decree is enforceable by proceedings in execution even though it had not been executed to the executing court directly. 10 L.W. 172=53 I.C. 673.

Death of the judgment-debtor.—The conditions of an undertaking given by a surety that the judgment-debtor would apply in insolvency within a specified time and that he would appear in court whenever he was required to do cannot be enforced if the judgment-debtor dies before the time of his appearance in court had arrived. In that case it is impossible for the surety to produce the judgment-debtor and the decree-holder loses his remedy against the surety. 41 O. 50 ; 24 M. 637.

When sureties agreed to produce the judgment-debtor but failed without further notice they can be made liable on their bonds for their failure. (1923) M.W.N. 770. A person who becomes a surety for the appearance of the judgment-debtor when called upon to do so, does not become a party to the decree and the decree cannot be realised from him. 50 P.R. 1905 ; 24 M. 560 ; 46 B. 702 ; 28 A. 387. When a security bond given under S. 55 (4) happens to contain a covenant by the surety as to what would happen in case the judgment-debtor's application to be declared an insolvent were refused, such a stipulation is held not to come within the purview of the section so as to be enforceable in the manner provided by it. 16 A. 37 (referred to in 100 P.R. 1894). The extent of the surety's liability is that created by S. 145, C. P. Code, even when the liability is limited in its terms. 34 I.C. 407=(1916) 2 M.W.N. 273 ; 81 I.C. 702=(1924) Pat. 487 ; 23 A.L.J. 59. Under the corresponding S. 336 of the old Code, where a security happened to contain a covenant by the surety as to what would happen in case the judgment-debtor's application to be declared an insolvent was refused, such a stipulation was not governed by the section and not enforceable under it. 16 A. 37. S. 145 is wide enough to include cases under S. 55 (4). 34 I.C. 407=(1916) 2 M.W.N. 273. When the surety executed a bond which did not restrict his liability to the execution case then pending but indicated a perfect general liability to pay the decretal amount, the liability of the surety could be enforced under S. 145, C. P. Code, even though the execution case had been struck off. 57 I.C. 303=(1921) Pat. 19 ; 14 C. 757 ; 21 I.C. 612.

(2) **Discharge of surety.**—The surety is discharged by the death of the judgment-debtor. 24 M. 637 ; 41 C. 50 ; see also 29 A. 466 ; 48 B. 500. The liability of the surety does not exist after the dismissal of the execution application. 21 I.C. 612 ; 19 B. 694 ; but see 14 C. 757. The liability of the surety is discharged when the judgment-debtor has applied to be declared an insolvent. 19 B. 210 ; 13 A. 100 ; 100 P.R. 1894 ; 15 A. 183 ; 24 M. 560 ; 26 M. 366. This is old law ; the other condition as to appearance should also be satisfied. 78 I.C. 447 ; 22 I.C. 953=15 M.L.T. 224 ; 34 I.C. 407. The liability of a surety under O. 21, r. 55 becomes discharged by the judgment-debtor applying to be made an insolvent. An order refusing to discharge the surety is not appealable and is therefore open to revision under section 115, C. P. Code. 15 A. 183 ; see also 58 P.L.R. 1902 ; 16 A. 37. See cases above cited as to the other condition under the new Code. The mere filing of the insolvency petition by the judgment-debtor or the dismissal of an execution application does not discharge the surety. 34 I.C. 407 ; 57 I.C. 303 ; 78 I.C. 447. If the petition for insolvency is filed, but is returned for amendment and is not represented, the liability of the surety is not discharged. 1 L.W. 17. If the surety wants to withdraw his security the issue of the warrant against the judgment-debtor is not sufficient. It is only when the latter is brought before the Court that the surety is released. 48 B. 500.

(3) **Right of the decree-holder under the security.**—The liability of a surety under S. 55 (4) enures for the benefit of the court as well as for the decree-holder. The court accepting security may enforce it failing which the decree-holder is equally entitled to enforce it in any way that may be open to him for he is the ultimate

beneficiary under the security bond. 5 P.L.T. 386=81 I.C. 702. Where cash security is deposited by a surety for the benefit of a decree-holder to enable the judgment-debtor to make an application in insolvency and the insolvency application fails, the cash security must be paid to the decree-holder in preference to its being forfeited to the Government. 39 C. 1048.

(4) Enforcement of the liability of the surety.—This section provides for a summary realisation of the security from the surety who has incurred the liability. 13 C. P. L. R. 106; 19 A. 247; 143 P. R. 1908. Before the surety can be proceeded against, he must be called upon to produce the judgment-debtor in Court and it is only on his default that the surety would become liable under the bond (in a case where the judgment-debtor had applied for insolvency). 78 I.C. 447.

(5) Security not providing for performance of the decree.—A security bond not providing for the performance of the decree by the surety on default of the conditions prescribed, is not one under this section. A.W.N. (1900) 156.

(6) Extent of security.—When a judgment-debtor furnishes security under S. 55 (4) the security shall be directed to continue until a final order is made on his petition to be declared an insolvent. 23 Bom. L.R. 1263=46 B. 702.

(7) Notice to the surety.—A notice should be issued to the surety before enforcing his liability in execution. 78 I. C. 447; 19 M. L. T. 81. A surety may waive the condition of a previous notice in which case it is not necessary to issue a notice. (*ibid*); 34 I.C. 407.

APPLICATION FOR INSOLVENCY WITHIN ONE MONTH.—When the judgment-debtor does not apply within one month, he is liable to be arrested and detained in the civil prison. And if he had failed so to apply, and he was not arrested again, he was entitled to apply at a subsequent date on the strength of the permission previously given. 25 M. 724. A judgment-debtor may apply for insolvency during his imprisonment and he may then be released under the conditions prescribed. 11 C. 451 (but see 8 M. 503).

EFFECT OF INSOLVENCY APPLICATION ON OTHER EXECUTION APPLICATIONS.—When the judgment-debtor has applied for insolvency under this section in one of the execution proceedings he is not exempted to be arrested and detained in the civil prison unless he has been actually discharged in other execution proceedings against him. 9 O. C. 42; 16 C. 85.

RELEASE OF JUDGMENT-DEBTOR BY HIGH COURT.—When a judgment-debtor arrested in execution of a decree of the High Court in its Original Civil Jurisdiction, and brought before the Court claims to be discharged on the ground that he intends to apply to the Court to be declared an insolvent, either under the provisions of S. 55 or under 11 and 12 Viet., c. 21, he is entitled to be discharged on complying with the conditions of S. 55 (4). 8 M. 276.

RELEASE FROM ARREST.—Release on the ground of illness.—(1) At any time after a warrant for the arrest of a judgment-debtor has been issued, the Court may cancel it on the ground of serious illness.

(2) Where a judgment-debtor has been arrested, the Court may release him, if in its opinion, he is not in a fit state of health to be detained in the civil prison (S. 59.)

RELEASE ON THE GROUND OF APPLYING IN INSOLVENCY.—A judgment-debtor who is arrested can be released on furnishing security under S. 55 ; but if he is committed to jail, he can be discharged only under S. 58. 8 M. 509 ; 12 B. 46.

VI.—DETENTION IN CIVIL PRISON.

The detention of the judgment-debtor may be in the civil prison of the District in which the Court ordering the detention is situate or where such prison does not afford suitable accommodation, in any other place which the Local Government may appoint, for the detention of persons ordered by the Courts of such district to be detained. (S. 55.)

PARTICULAR JAIL.—When a warrant orders the imprisonment of a debtor in a particular jail, his confinement in a different jail is not lawful. 11 C. 527.

PERIOD OF DETENTION.—Every person detained in the civil prison in execution of a decree shall be so detained,—

(a) where the decree is for the payment of a sum of money exceeding fifty rupees, for a period of six months ; and,

(b) in any other case, for a period of six weeks. (S. 58.)

DETENTION IN CASE OF INSTALMENT DECREE.—In the execution of a decree for money payable by instalments, the judgment-debtor cannot be arrested and detained in civil prison separately for default in the payment of each instalment. 7 B. 106.

DISCRETION IN FIXING THE PERIOD.—The Court has no authority to fix any term of imprisonment. 13 M. 141 ; 5 C.W.N. 145. The Court has no power to release the judgment-debtor before the prescribed period except as provided in S. 58. 12 B. 46. Arrest before judgment becomes one in execution after decree and detention after the date of the decree must be taken in counting the period of six months. 37 B. 431 ; Bourke O.C. 423. The total period of detention should not exceed six months or six weeks as the case may be. 5 N.W.P. 220. S. 85 does not apply in cases of contempt of Court. 4 C. 655.

When a judgment-debtor has been on several occasions imprisoned in execution of a decree for more than the maximum period for which he can be legally kept in prison he is entitled to be released. 5 N.W.P. 220.

VII.—RELEASE FROM ARREST AND DETENTION.

(1) A judgment-debtor shall be released from detention before the expiration of six months or six weeks, prescribed, as the case may be,—

- (i) on the amount mentioned in the warrant for his detention being paid to the officer-in-charge of the civil prison, or
- (ii) on the decree against him being otherwise fully satisfied or,
- (iii) on the request of the person on whose application he has been detained, or
- (iv) on the omission, by the person on whose application he has been so detained, to pay subsistence allowance :

Provided that he shall not be so released from such detention under clause (ii) or clause (iii) without the order of the Court.

(2) A judgment-debtor released from detention under this section shall not merely by reason of his release be discharged from his debt, but he shall not be re-arrested under the decree in execution of which he was detained in the civil prison. (S. 58.)

CL. (IV) SUBSISTENCE ALLOWANCE.—When subsistence allowance was sent by money order sufficiently early to reach the officer in time, but which in fact did not reach him in time, it amounted to an omission to pay within the meaning of cl. (iv) and the debtor released is not liable to be re-arrested. 22 I.C. 25. The monthly allowance must be paid in advance. The judgment debtor is entitled to discharge if the subsistence allowance is not paid before the beginning of the month. Bourke O.C. 51. The cost of clothing payable under S. 33, Pensions Act (IX of 1894) is not subsistence allowance as contemplated in S. 58 of the O.P. Code which includes only the monthly allowance fixed by scale under S. 57, C.P. Code. 17 I.C. 911=5 Bur. L.T. 159.

PETITION FOR DISCHARGE.—No particular form of petition of discharge is required for a prisoner applying for his discharge for non-payment of subsistence money. Bourke O.C. 28.

RELEASE ON THE GROUND OF ILLNESS.—Where a judgment-debtor has been committed to the civil prison, he may be released therefrom,—

- (a) by the Local Government on the ground of the existence of any infectious or contagious disease, or

(b) by the committing Court, or any Court to which that Court is subordinate, on the ground of his suffering from any serious illness.

A judgment-debtor released under this section may be re-arrested, but the period of his detention in the Civil prison shall not in the aggregate exceed that prescribed by section 58. (S. 59.)

EFFECT OF PROTECTION ORDER.—Any insolvent arrested or detained contrary to the terms of the protection order under the Insolvency Act, is entitled to his release. 20 C. 874; *contra* held in 26 B. 652 and 33 A. 279 and *held* that a judgment-debtor who has obtained an interim protection order under S. 13 of the Indian Insolvency Act is liable to be arrested in execution of the same decree.

RELEASE FROM ARREST IF IT IS ILLEGAL.—A Judge has power to issue order for the release of the judgment-debtor if he is found to have been illegally arrested at a time when he was exempt from arrest. 5 I.C. 909=20 M.L.J. 136.

POWER OF INSOLVENCY COURT TO ORDER RELEASE.—When a judgment-debtor is arrested in execution of a decree and confined in jail, the Insolvency Court has no jurisdiction under the Insolvency Act to order his release. 30 P.L.R. 1910.

POWER OF THE HIGH COURT TO ORDER RELEASE.—When a prisoner committed to jail by Pres. Small Cause Court in execution of a decree of that Court is brought before the High Court in obedience to a writ of *Habeas corpus ad subjectum*, it is competent to the High Court to release him from jail on the ground that at the time of his arrest he was privileged from arrest. 1 C. 78.

VIII.—SUBSISTANCE ALLOWANCE.

The Local Government may fix scales, graduated according to rank, race and nationality, of monthly allowances payable for the subsistence of judgment-debtors. (S. 57.)

(1) No judgment-debtor shall be arrested in execution of a decree unless and until the decree-holder pays into Court such sum as the Judge thinks sufficient for the subsistence of the judgment-debtor from the time of his arrest until he can be brought before the Court.

(2) Where a judgment-debtor is committed to the civil prison in execution of a decree the Court shall fix for his subsistence such monthly allowance as he may be entitled to according to the scales fixed under section 57 or, where no such scales have been fixed, as it considers sufficient with reference to the class to which he belongs.

(3) The monthly allowance fixed by the Court shall be supplied by the party on whose application the judgment-debtor has been arrested by monthly payments in advance before the first day of each month.

(4) The first payment shall be made to the proper officer of the Court for such portion of the current month as remains unexpired before the judgment-debtor is committed to the civil prison, and the subsequent payments, if any, shall be paid to the officer-in-charge of the civil prison.

(5) Sums disbursed by the decree-holder for the subsistence of the judgment-debtor in the civil prison shall be deemed to be costs in the suit :

Provided that the judgment-debtor shall not be detained in the civil prison or arrested on account of any sum so disbursed. (O. 21, r. 39).

ADDITIONAL RULE MADE BY THE MADRAS HIGH COURT.—In O. 21, r. 39, delete the present sub-rr. 4 and 5 and substitute the following: (4) Such sum (if any) as the Judge thinks sufficient for the subsistence and cost of conveyance of the judgment-debtor for his journey from the Court house to the civil prison, and from the civil prison, on his release, to his usual place of residence together with the first of the payments in advance under sub-r. (3) for such portion of the current month as remains unexpired, shall be paid to the proper officer of the Court before the judgment-debtor is committed to the civil prison, and the subsequent payments (if any) shall be paid to the officer-in-charge of the civil prison. (5) Sums disbursed under this rule by the decree-holder for the subsistence and cost conveyance (if any) of the judgment-debtor shall be deemed to be costs in the suit.

ADDITIONAL RULES MADE BY THE RANGOON HIGH COURT.—O 21, r. 38-A.—The actual cost of conveyance of a civil prisoner shall be borne by the Court ordering his arrest or requiring his attendance at Court, as the case may be, and shall not be charged to the judgment-creditor.

O. 21, r. 39 (2) (A).—When a civil prisoner is kept in confinement at the instance of more than one decree-holder, he shall only receive the same allowance for his subsistence as if he were detained in confinement upon the application of one decree-holder. Each decree-holder, shall however, pay the full allowance for subsistence and where the debtor is released, the balance shall be divided rateably among the decree-holders, and paid to them.

SCOPE.—Allowance means subsistence money fixed by order of the Court. Bourke O.O. 59, 52. A jailor or other officer cannot lawfully receive a prisoner for debt under confinement unless the preliminary payment of subsistence allowance has been made in compliance with the order of the Court. 5 B.L.R. App. 80 ; 1 Bourke 28 ; 1 Bourke 51 ; 1 Bourke 69. Where the jailor had in hand a balance of unexpended subsistence money from the previous month and the creditor paid sufficient amount with the balance to provide for the subsistence of the debtor for another month, this was held to

be sufficient allowance under the section. 5 B.L.R. App. 80. A Civil Court has no concern with the bedding, clothing, or cooking utensils or any other articles required by the jail authorities. 43 P.R. 1893.

REFUND OF SUBSISTANCE ALLOWANCE.—The decree-holder is entitled to a refund of the balance of subsistence allowance on the release of the judgment-debtor. 5 B.H.C. A.C. 84.

IX.—RE ARREST.

A JUDGMENT-DEBTOR RELEASED FROM DETENTION on any of the grounds mentioned in S. 58 shall not be liable to be re-arrested under the decree in execution of which he was detained in the civil prison. (S. 58). Bourke C.C. 109 ; 9 B. 181.

A JUDGMENT-DEBTOR MAY BE RE-ARRESTED.—When he is released under S. 59 and the period of his detention in the civil prison does not in the aggregate exceed that prescribed by S. 58. (S. 59). A judgment-debtor released under O. 21, r. 40, may be re-arrested. (O. 21, r. 40 (5).) A judgment-debtor who was imprisoned in execution of a decree and obtained an interim protection order under S. 13 of the Insolvency Act may be re-arrested. 26 B. 652 ; 32 A. 279. A judgment-debtor erroneously released by the Court may be re-arrested. Old S.O. (Oudh) 32 ; 17 I.C. 911 = 5 Bur. L.T. 159. The immunity from re-arrest of a judgment-debtor depends not only upon his having been arrested but upon his having been imprisoned under the arrest. 23 C. 128 ; 6 M.H.C.R. 84. The Code expressly preserves a distinction between arrest and imprisonment and the immunity from re-arrest is only granted by actual confinement. 8 M. 21 ; 6 M.H.C. 84 ; 23 C. 128 ; 26 A. 317. A discharge of a judgment-debtor before imprisonment on account of non-payment of the subsistence money for the debtor is no bar to the debtor being re-arrested. U.B.R. (1897-1901) Vol. II, page 281 ; 26 A. 317. A confinement in the Court room is sufficient to debar from a re-arrest. 9 B. 181.

Motion by decree-holder before re-arrest.—A judgment-debtor cannot be re-arrested without any petition or motion by the decree-holder to that effect. 15 W.R. 68. Under the Civ. Pro. Code there is no power in the Court to order a second arrest of the judgment-debtor under one and the same decree. 20 C. 874 ; 12 C. 652 ; (not followed in 26 B. 652 ; distinguished in 23 C. 128).

A judgment-debtor arrested in 1871 and discharged after his examination (his estate not being taken possession of) cannot be re-arrested in execution of the decree for any subsequent act of alienation. 6 M. 170. When the judgment-debtor was discharged from arrest on the application of the decree-holder on the ground that an arrangement had been made for the liquidation of the debt which was satisfactory, the Civ. Pro. Code does not prevent the re-arrest of the debtor so discharged if he failed to perform the agreement he had made with his creditor. 37 P.R. 1873. In execution of a decree payable by instalments, the judgment-debtor cannot be arrested and imprisoned separately for default in payment of each instalment. 7 B. 106. Where a judgment-debtor is discharged from arrest on the ground that he is exempt from arrest he may be re-arrested. 23 C. 128. No order of restitution or discharge under r. 26 of O. 21 shall prevent the property or person of a judgment-debtor from being re-taken in execution of the decree for execution (O. 21, r. 27.).

X.—EFFECT OF ARREST, DETENTION AND RELEASE.

Effect of release.—(i) A judgment-debtor released from detention, shall not merely by reason of his release be discharged from his debt. (ii) In cases mentioned in Part IX he cannot be re-arrested.

Effect of arrest and detention.—Arrest and detention of a judgment-debtor do not affect the amount of the decree or any other relief given by the decree. The detention for a fixed period is in addition to the claim in the decree. The arrest and detention are a punishment for not obeying the decree. 6 B.H.C. R. 86.

XI — WARRANT OF ARREST AND ILLEGAL ARREST.

PROCESS FOR EXECUTION.—(1) When the preliminary measures (if any) required by the foregoing rules have been taken, the Court shall, unless it sees cause to the contrary, issue its process for the execution of the decree.

(2) Every such process shall bear date the day on which it is issued and shall be signed by the judge or such officer as the Court may appoint in this behalf and shall be sealed with the seal of the Court and delivered to the proper officer to be executed.

(3) In every such process a day shall be specified on or before which it shall be executed. (O. 21, r. 24.)

WARRANT OF ARREST TO DIRECT JUDGMENT-DEBTOR TO BE BROUGHT UP.—Every warrant for the arrest of a judgment-debtor shall direct the officer entrusted with its execution to bring him before the Court with all convenient speed, unless the amount which he has been ordered to pay, together with the interest thereon and the costs (if any) to which he is liable, be sooner paid. (O. 21, r. 38.)

ILLEGAL ARREST AND DETENTION.—When an officer of the court arrests a judgment-debtor without having in his possession the warrant of arrest at the time of arresting, the arrest is illegal. 5 A. 318. When a warrant is addressed not by name, but to the bailiff of the Court an arrest in consequence is not illegal. 25 I.C. 328 = (1914) M.W.N. 498. A warrant without the seal of the court is illegal. 19 O.W. 225. When a warrant for the arrest of the judgment-debtor has been executed, but the endorsement thereon is irregular, such irregularity does not invalidate the arrest, 6 A. 385. An arrest is not rendered illegal by the circumstances that the endorsement of the execution of the warrant is made professedly under O. 21, r. 25 by an officer other than the one who was entrusted with its execution. 6 A. 385; 22 O. 596. Detention in the house of the decree-holder is not wrongful for the interval during which the judgment-debtor cannot be produced in court. 30 M. 179. When the warrant orders the imprisonment of the debtor in a particular jail, his confinement in a different jail is not lawful and the prisoner is entitled to be discharged. 11 O. 527. The detention is illegal unless the subsistence money is paid before the commitment to civil prison. Bourke O.C. 421. The warrant of arrest in execution of a decree empowers the sheriff only to arrest the defendant in execution and detain him for such reasonable time as is sufficient to allow of his being brought before the Court and having an opportunity of applying for his discharge. The detention of such prisoner

by the sheriff after such reasonable time, without further authority of law is illegal. Bourke O.C. 59. An arrest under civil process of a mofussal court on a Sunday in this country is perfectly legal. 4 M.H.C. App. 62 ; 7 M.H.C. 285. An arrest of the judgment-debtor while he is returning from Court under circumstances which give him a privilege of exemption from arrest is illegal. 21 P.W.R. 1916=36 I.C. 493.

Delegation by nazir to peon.—A nazir directed to arrest a judgment-debtor in execution of a decree is not debarred by anything in the C.P. Code from authorising a deputy to execute for him, and the endorsement of the deputy's name on the back of the warrant is sufficient *prima facie* evidence of the delegation. 6 A. 385 (Approved in 22 C. 596). Where a sheriff's officer, of his own motion, delivered over to the officer-in-charge of the Alipore Jail a debtor committed to the Presidency Jail, it was held that the imprisonment is unlawful and the prisoner was entitled to be discharged in consequence. 11 C. 527. When a wrong person is arrested and imprisoned under a decree to which he was no party, the person setting the Court in motion is not liable for such arrest and imprisonment, if he did not obtain the process fraudulently or improperly. 8 M.H.C. 38.

LIABILITY OF DECREE-HOLDER AND OFFICER OF THE COURT.—When a Court of competent authority has disposed of the matter, though erroneously, then the party who takes out the warrant is not liable ; but when the Court has no jurisdiction whatever to issue the warrant then the whole proceeding is '*coram non iudice*' and the party is liable. When the imprisonment is carried by some fault of the officers of the Court, they are liable and the suit against them is governed by limitation of one year under Art. 19 of the Limitation Act, 9 B. 1. As to sheriff's liability in case of the escape of the judgment-debtor from his custody. See 4 B. 65.

SUIT FOR DAMAGES.—The plaintiff must in a suit for damages on account of injuries resulting from an arrest in pursuance of a decree of court show that the original civil action out of which the alleged injury arose has been decided in his favour, that there was no reasonable or probable cause for the arrest and the injury obtained was something other than what has or might have been compensated for by an award of costs of the suit and that in fact there has been some collateral wrong. 4 C. 589. A suit for damages for wrongful arrest lies. (*ibid.*)

SUIT FOR WRONGFUL IMPRISONMENT.—Art. 19 of the Limitation Act applies to a suit for damages for wrongful imprisonment and the period of limitation is one year. A fresh cause of action arises so long as the imprisonment is continuing. 6 Bom. L.R. 704 ; 9 B. 1.

LIABILITY FOR CRIMINAL PROSECUTION.—A decree-holder is guilty of the offence under S. 342 of the Indian Penal Code, if he caused arrest of the judgment-debtor under circumstances which give him the privilege of exemption from arrest under S. 135, C. P. Code. The Court officer who arrests or makes over the warrants of arrest to his subordinate for compliance is also guilty of the same offence, 121 P.W.R. 1916=36 I.C. 493.

CHAPTER VII

ATTACHMENT

I.—PROPERTIES LIABLE TO ATTACHMENT.

PROPERTIES LIABLE TO ATTACHMENT AND SALE IN EXECUTION OF A DECREE—The following properties are liable to attachment and sale in execution of a decree, namely, lands, houses or other buildings, goods, money, bank-notes, cheques, bills of exchange, hundies, promissory notes, Government securities, bonds or other securities for money debts, shares in a corporation and save as provided otherwise, all other saleable property, moveable or immoveable belonging to the judgment-debtor, or over which, or the profits of which he has a disposing power, which he may exercise for his own benefit, whether the same be held by the judgment-debtor or by another person in trust for him or on his behalf (S. 60.)

SCOPE—The rules in S. 60 deal with sales held in execution of decrees in which previous attachment is necessary, i.e., to sales held in execution of simple money decrees and have no application to sales held in execution of mortgage decrees. 46 A. 489. The section is not exhaustive. 30 M. 978 ; 26 M. 423.

THE FOLLOWING PROPERTIES ARE LIABLE TO ATTACHMENT.—The equity of redemption, of a mortgagor in the mortgaged property is attachable. 21 B. 226 ; 1 O.P.L.R. 85 ; 5 B.L.R. 380 ; 43 I.C. 907—a case of an absolute occupancy tenant mortgaging his rights. 20 W.R. 20 ; 8 O.C. 327 ; 6 A.L.J. 48 ; 31 A. 314. But a mortgagee is not entitled by means of a money decree obtained against the mortgagor to sell the equity of redemption. 1 O. 337 ; 4 B. 57 ; 22 B. 624 ; 7 O.C. 314 ; 15 B. 222 ; 18 I.A. 22 P.C. ; 1 A. 240 ; 5 B.L.R. 450 ; see also 27 A. 517.

The share of a partner in partnership property or business is attachable. 20 O. 693 ; O. 21, r. 49 ; 3 C. 194 P.C. ; 13 M. 447 ; 158 P.L.R. 1903 ; 4 B. 222 ; 4 B. 227 ; 4 B. 229 ; (*contra* in 14 O. 383 , 14 M.I.A. 40 ; 5 B.L.R. 382) ; 80 I.C. 642.

The right to claim specific performance of a contract to sell land is liable to attachment. 14 O. 241.

The life interest in trust funds is liable. 12 M. 250.

A vested remainder is liable. 17 B. 503.

The right in a permanent lease even if the lease forbids a sale by the tenant. 20 O. 273 ; 19 O.W.N. 1182 ; 7 M. 315.

The country liquor is liable to attachment, though the permission of the Collector may be necessary to the sale under the Abkari Act. 10 B.L.R. 13 ; 11 N.L.R. 67—29 I.C. 339 ; 32 B. 157.

Money or other valuable security deposited as security for the due performance of duty by a servant with his master is liable but the attachment is subject to the lien of the master and the deposit cannot be sold until the same is at the disposal of the servant free from the lien of the master at the expiration of the period of employment, 9 M. 208.

The right, title and interest of the servant of a temple in land for services is liable to attachment, the interest being, when sold; subject in the hands of the alienee to determination by the death of the original holder, or by his removal from his office, for failure to perform the service. 6 B. 596; 15 C. 329.

A cover containing currency notes sent to the post office for delivery to A is liable to attachment on the ground that the cover is in the disposing power of B. 13 M. 242; 33 I.C. 723=14 A.L.J. 236; 22 B. 39.

So much of the sale proceeds of goods sold by an auctioneer, which represent his commission is liable to attachment as over that portion he has a disposing power. 23 A. 135.

The policy by a married man, effected on his own life although expressed on the face of it to be for the benefit of his wife or wife and children in cases to which the Married Women's Property Act does not apply, is liable to attachment. 37 M. 483 F.B.; 37 B. 471. It has been held by the High Court of Madras that the above Act applies in the case of Hindus, while the Bombay High Court holds that it does not so apply.

Debts.—A debt is an obligation to pay a liquidated or specific sum of money. 31 B. 393. Money that has not become due is not debt. Debt means an actually existing debt. A sum of money which might or might not become due is not debt. 27 C. 38; 38 C. 13; 28 C. 483; 9 C.W.N. 703; 12 C.W.N. 145; 30 A. 246; 23 A. 164; 7 B.L.R. 186; 78 I.C. 881=1925 C. 561; 3 Rang. 235. The sale proceeds of A in the hands of B are a debt due to A from B. 16 A. 286. Monthly maintenance allowance for some future time is not debt. 27 C. 38; 3 C. 414. When the sale is complete the sale price in the hands of the vendee is a debt. 23 A. 64; but if the sale is not complete and there is only an agreement to sell the sale price is not debt and not liable to attachment in the hands of the vendee. 3 A. 12; A.W.N. (1889) 154. Maintenance allowances, private pensions and wages of private servants that have already become due are debts. 6 W.R. 64; 6 C.L.R. 19; 21 M. 393; 31 A. 304. A debt that is paid by means of a cheque no longer exists and cannot be attached. 3 B. 49; 4 Bur.L.T. 148=12 I.C. 869. A mortgage debt secured by a simple mortgage is a debt. 9 M. 5; 10 M. 169; 20 C. 805; 21 O.C. 400=50 I.C. 157; 80 I.C. 890=23 A.L.J. 840; 18 M. 437; 15 A. 134; 12 C. 546; 20 C. 805; 36 C. 115; 19 B. 121; 18 M. 457; 26 B. 305; 37 M. 51; 25 B. 305; 29 C. 1 F.B.; 18 P.R. 1909; 16 I.O. 816; 37 M.L.T. 239=26 I.C. 508; 23 C. 450; 6 C.W.N. 5; 14 C.P.L.R. 5; 18 A. 469. But see *contra* in 9 C. 511; and 125 P.L.R. 1913=18 I.C. 318; 9 M. 5; 10 M. 169. A debt secured by a usufructuary mortgage is not a debt but immoveable property. 35 B. 288; 13 Bom. L.R. 233; 26 B. 305; 19 B. 121; 18 P.R. 1909; 9 C. 511. When A agrees to advance Rs. 5,000, on a mortgage of B's property to B, and advances Rs. 3,000 only, the sum of remaining Rs. 2,000 cannot be considered as a debt of B in the hands of A liable to attachment. 30 A. 252. The unpaid portion of a loan due by a mortgagee to a mortgagor is not a debt. 6 A.L.J. 491. Where there is a debt payable by the mortgagor the fact that the mortgagee is in possession of the land does not take it away from the scope of r. 46. 39 M. 389; 27 M.L.J. 239. The term debt in O. 21, r. 46 of the Code is used in its legal sense of a debt either due or accruing due. 14 C.L.J. 127; 22 B. 39. An uncertain sum which may or may not be payable by one member to another of a partnership cannot be attached or sold in execution of a decree. 14 C. 383; 20 C. 693;

158 P.L.R. 1903; (*contra* in 13 M. 447). A debt due by an agent or vendee to the principal or vendor is liable to attachment, even when it happens to be unascertained, but is capable of being ascertained. 16 A. 286. A deposit in a Railway Provident Fund is liable to attachment after the debtor has retired from service. 5 B.L.R. 454; 17 A.W.N. 88. A contrary view is taken in 12 Bur. L.T. 247=56 I.C. 948, where it is *held* that an attaching creditor can attach money deposited by a judgment-debtor as security for the performance and completion of a contract although it is not payable to a judgment-debtor till the completion of a contract and may even be liable to forfeiture. A debt that is enforceable by a foreign court only is not liable to attachment. 5 B. 249; 26 M. 429. A monthly allowance given in payment of an antecedent debt and acknowledged by the debtor as such is liable to be attached as a debt. 9 C.W.N. 703. Arrears of rent due to a lessor are a debt. 5 A.L.J. 265. Property, the gift of which is not complete, is not a debt in the hands of the donor. 6 A. 634. A sum allowed by the Court of Wards under S. 22 of the North Western Provinces and Oudh Court of Wards Act 1899 in respect of the expenses of a ward and of his family and dependants is not a debt within the meaning of S. 60 (1) of the C.P. Code. 7 O.C. 174. When a cheque is drawn in favour of a certain person for a contractor it cannot be attached so as to stop payment to that person in execution of a decree against the contractor. 3 B. 49; 28 M. 264. Moneys due to a contractor cannot be attached after the sale of a contract to a third person and the latter is entitled to a refund from the attaching creditor. 3 B. 49. Money standing to the credit of a judgment-debtor at a Bank is liable to attachment. (1892) A.C. 118. The share of an undivided brother in the ancestral family money-lending business cannot be attached in execution against him personally. 23 I.C. 156=10 N. L. R. 17; 172 P.L.R. 1915. A debt which is certain to become payable at a future date is liable to attachment. 9 C.W.N. 703. A right to sue for damages arising out of a breach of contract is not a debt. 78 I.C. 409. Though a decree of a Revenue Court is not liable to attachment under O. 21, r. 53 such a decree stands in the position of an ordinary debt and may be attached under O. 21, r. 46. 21 A. 405. When an amount is paid by means of a cheque it may be attached if the garnishee is served with a notice and he stops payment. But if the garnishee does not stop the cheque the debt cannot be attached. 12 I.C. 869=4 Bur. L.T. 148. If the attachment is made after the cheque for the amount has been given the cheque cannot be stopped. 3 B. 49; 12 I.C. 869. A right to sue for damages for breach of contract is not a debt and is not liable to attachment and sale. Any sale thereof is invalid and confers no title on the vendee. 78 I.C. 409=1925 S. 98.

Arms.—The sale of arms by the Nazir of the court in execution of a decree is a sale by a public servant in the discharge of his duty and therefore excluded by S. 1 (b) from the operation of Indian Arms Act XI of 1878. In such a case however it would be proper for the court ordering the sale to give notice of the sale and of the purchaser's name and address to the Magistrate of the District or the Police Officer in charge of the nearest police station as contemplated by S. 57 of the Act. 9 B. 518.

The rights of a *goentia* with protected status are liable to attachment and sale in execution of a decree. A general restriction to an assignment does not apply to an assignment by operation of law. 9 C.P.L.R. 134.

Property in the disposing power of the judgment debtor.—A restriction of alienation placed on the power of a Hindu widow who is allotted maintenance for her life is a valid one and prevents the attachment of property. 47 B. 597. A legacy reserved by a testator from his estate and devised in favour of his great-great-granddaughter which has been in pursuance of the directions contained in the will put in strict settlement by the executor and subsequently reserved by a mortgage of the real

estate of the testator to the trustee of the settlement is a charge on the whole estate and not liable to sale in execution of a decree against the executor. 5 W.R. 126 F.C. An annuity which is a charge upon an estate payable to the judgment-debtor is liable to attachment. 23 A. 164; 17 W.R. 254; 11 W.R. 138; 10 C.W.N. 1102; 30 M. 279; 27 C. 38; 6 B.L.R. 646. The jurisdiction of an executing Court to attach moveables belonging to the judgment-debtor in the hands of another or under his control or a debt due to him or under his control is co-relative and co-extensive with the right which the judgment-debtor would himself have had to sue for the recovery of his property or of his debt as against his debtor or his trustee. (1919) Pat. 155=48 I.C. 943. A Hindu father or manager of joint Hindu family has disposing power over ancestral property, and hence it is liable to attachment against him. 26 M. 214; 11 B. 37. Property may be attached to the extent to which a judgment-debtor has a disposing power which can be exercised for his own benefit. 15 O. 329 P.C. Any interest in the property that is mortgaged and in respect of which a manager or receiver is appointed by the Court is liable to attachment. 19 W.R. 37. When a person holds possession of property for 12 years under a sale from another it cannot be attached in execution against the latter. 6 W.R. 161. Deposits on the works of another and by him are not liable to attachment against the depositor. 2 N. W.P. 337. A right to land reserved for the use of the donor is liable to attachment against him. 14 C. 241.

Saleable Property.—The Court will not prevent a decree-holder from enforcing his decree by sale of an estate in which the judgment-debtor had a saleable interest merely on the ground that the estate is entangled and that it would be more convenient to the judgment-debtor if the judgment creditor should wait and realise his debt from the proceeds of another estate which is under attachment. 11 W.R. 342. The word saleable in S. 60 of the C.P. Code means saleable by auction at a compulsory sale under the orders of the Court and not transferable by act of parties. Where a landlord has not imposed on a permanent holding immunity from Court-sales, but has merely forbidden private transfers by the tenant, the latter has no right to complain if the land is sold by Court. 19 C.W.N. 1182=28 I.C. 837; (20 C. 273 followed). A decree in favour of the judgment-debtor may be attached. 15 W.R. 34; 21 A. 405; 7 B.L.R. 318; W.R. 1864 Mis. 28; 27 B. 556 (a decree dissolving partnership); O. 21, r. 53; 6 M. 418. The property of a judgment debtor which is subject to a pending suit is liable to attachment. 19 W.R. 132. Property acquired by adverse possession is liable to attachment. 24 C. 244. Property to be found in the *zanana* of a judgment-debtor can be attached. 17 W.R. 86. The interest of a lessee from the Government is attachable. A.W.N. (1882) 100. A permanent tenancy with a condition of forfeiture on transfer can be attached. 22 I.C. 837=19 C.W.N. 1184. The hereditary interest of a tenant subject to payment of quit-rent and the duty of furnishing men to the zamindar can be attached. 24 W.R. 909. A right to remain in the occupation of the land is liable to attachment. 28 I.C. 576=21 C.L.J. 302. Where a lessee was prohibited from alienating by sale or gift, the lessee still had an interest which is saleable within the meaning of S. 60, C.P. Code. 20 C. 273. A right to get reconveyance of property is liable to attachment. (1921) M.W.N. 519. The *quantum* of the interest of a person in possession of a property is not inalienable. 86 I.C. 443=1925 M. 627. An occupancy holding is liable to attachment in the execution of decrees not only of the landlord, but also of other creditors. 1926 C. 337 (1)=90 I.C. 993. See also 48 C. 184; 1924 C. 52. A decree-holder is not precluded from taking any of his judgment-debtor's property in execution of his decree merely because he had a lien on particular properties. 4 N.W.P. 99.

Fine.—Fine paid by order of a Criminal Court becomes the property of the person paying it as soon as the sentence is annulled and refund of fine ordered and thus it is

liable to attachment, being money of the judgment-debtor in the custody of a public officer. 89 P.R. 1912.

The interest of an undivided member in a joint Hindu family is liable to attachment. 4 C. 723.

An actionable claim is liable to attachment. 14 C. 24.

The interest of a shipowner in a ship can be sold, 1 Ind. Jur. 241, N.S.; 1 Ind. Jur. N.S. 263.

Produce from State land may be attached. U.B.R. (1908) 3rd Qr. Land and Revenue Reg. 1.

An unfranchised Inam can be attached. 6 M.L.T. 132.

In the case of land gifted as jagir without the power of alienation, the land is inalienable, but the crops standing on it can be attached. 24 I.C. 805.

Property and profits from property are attachable. 12 W.R. 391; 9 W.R. 450, but future profits cannot be attached. 28 C. 483; 30 A. 246. A property may be attached although its sale may be effected by a suit. 22 C. 813.

A bona fide assignment by a debtor of his entire property to trustees for the benefit of the creditors divests him of any interest which can be the subject of attachment subsequently issued in execution of a decree against such debtor, until the trusts of the deed of assignment have been carried out. 1 B.H.C. 233; 10 B.H.C. 327; 3 Bom. L.R. 905.

Properties of husband and wife.—When a woman acquired an interest in the property by her marriage jointly with her husband, then although she could not alienate her share without her husband's consent, her interest in joint property was attachable. 8 I.C. 992. A decree obtained against a wife in respect of a business carried on by her alone in which her husband had no concern, could be executed only against her separate property, and her husband with an English domicile could not be made liable. 4 C. 140.

II.—PROPERTIES NOT LIABLE TO ATTACHMENT.

THE FOLLOWING PROPERTIES ARE NOT LIABLE TO ATTACHMENT.—
Land assigned to a Hindu Widow for her maintenance with a proviso against alienation is not liable to attachment. 10 B. 342; 15 A. 371; 16 A. 443.

A religious office is not liable to attachment. 6 M. 76.

The right of managing a temple or officiating at the worship conducted in it and the right of receiving offerings at the shrine are not liable to attachment. 4 A. 81; 5 M. 89; 15 A. 35; 23 M. 231; 1 O.W.N. 493; 29 C. 470.

The property of a temple cannot be sold away from the temple. 6 B. 596; 15 C. 329 P.O.; 6 O.W.N. 663.

The income of property subject to a restraint upon anticipation accruing due after the date of judgment cannot be attached in a decree against the separate property of a married woman passed under S. 8 of the Married Women's Property Act, 30 M. 378.

The right of a widow to reside in her husband's house under the Hindu Law cannot be attached. 31 M. 500.

Expectant claims under an award or otherwise cannot be attached. 14 M. I. A. 40; 7 B.L.R. 186 P.C.; 8 B.H.O. 150; 28 C. 483 6 O.L.R. 14; 19 C. 384; 10 B.H.O. 339; 22 W.R. 214; 2 B. 540; 9 O.W.N. 703; 13 M. 447; 13 O.W.N. 966=36 C. 936 F.B.; 20 C. 693; 38 C. 13; 27 C. 38; 8 O.C. 409.

The doors and windows of a building cannot be separately attached, for they have no separate existence as property. 11 C. 164; 13 M. 518; 14 M. 467.

An uncertain right in an unascertained property is not liable. 6 M.I.A. 510.

OBJECTS OF TRUST cannot be attached in execution against a trustee. 23 B. 131; 4 A. 81; 15 C. 329; 19 W.R. 227; 15 W.R. 339; 7 W.R. 266 5 B. 393; 10 B. 395; 1 C.W.N. 493; 20 W.R. 280; 4 I.A. 76; 28 C. 574; 31 C. 1080; 9 O.W.N. 9; 35 C. 320; 6 C.W.N. 663; 1 M. 235; 14 W.R. 266; 5 B.L.R. 617; 5 M. 89. When there is a gift to a son subject to an obligation to perform certain services which was imposed as a burden upon him, the son being left in beneficial enjoyment of the property after the discharge of the burden so imposed, the interest of the son could be attached in execution of a decree against him. 9 I.C. 768.

A bonus sanctioned by a Railway Company to its servants cannot be attached unless it is paid up. 6 A. 634. A decree against a Karnavan in his individual capacity cannot be executed against the tarwad property in the hands of his successor as the interest of the deceased in the property survives to the other members. 5 M. 223.

Sale proceeds of property in the hands of an auctioneer in a decree against him cannot be attached except to the extent of his commission. 23 A. 135; A.W.N. (1901) 20.

A policy effected by a married man in favour of his wife governed by the Married Women's Property Act is not liable to attachment. 37 B. 471.

The mere fact that a trustee in carrying on the business of a trust had rendered himself personally responsible for the business debts would not itself give creditors a right to proceed against the trust property. The trust property is liable only (1) if the debt was incurred in the regular course of trusts; (2) the trustee had a right to be indemnified from the trust property to the extent of the claim, and (3) the creditors were entitled to stand in the shoes of the trustee in respect of the indemnity and to be recouped out of the trust estate. 28 C. 574; 35 C. 320. Money payable to sardars as the wages of coolies are not liable to attachment in execution of a decree against the sardar. 10 W.R. 149.

Life interest of a judgment-debtor in certain property in the hands of the trustees is not liable to attachment. 12 M. 250. A part of the mortgage money deposited by the mortgagee with the mortgagor for the marriage of the former's daughter cannot be attached in execution of a decree against him. 7 P.L.R. 1905. The transfer of a religious office to a person not in the line of heirs though otherwise duly qualified is not legal. 6 M. 76; 3 M.H.C. 380; 7 M.H.C. 210; 1 M. 235; 2 C. 347. The Asthan property is not liable to be attached and sold in execution of a personal decree obtained against the mahant. 61 I.C. 757=8 O.L.J. 210.

IF BY ANY LAW PROPERTY IS NOT LIABLE TO ATTACHMENT, IT CANNOT BE ATTACHED. 30 M. 378.

Occupancy rights are not saleable in Bengal. 26 C. 727; 24 C. 355.

Occupancy rights are not saleable in N.W.P. 28 A. 696; 29 A. 327.

Land of an agriculturist cannot be sold in execution of a money decree but can be attached. S. 16 of the Land Alienation (Panjab) Act.

Hereditary Village Officers Act, III of 1895.—When the prohibition against attachment and sale of lands have been considerations of public policy in view, such prohibition must be deemed to be absolute and it deprives Courts of all powers of attaching and selling such lands serving as emoluments for Village Officers under S. 5 of the above Act and such a decree is *ultra vires*. 28 M. 84.

Crops growing on the Inam service land in a Zamindari are not liable to attachment in execution of a decree against the village servant concerned under the Hereditary Village Officers Act III of 1895. 23 M. 492.

Agra Rent Act, XII of 1881.—S. 9 of the Act forbids the sale of a right of an proprietary tenant in a holding in execution of a decree against the tenant. The purchaser of such a right acquires nothing. A.W.N. (1905) 153.

Tosh Guas Haq is not liable to attachment under Bombay Act VII of 1887. 93 B. 258.

There is nothing in S. 99, T.P. Act, to prohibit the attachment of mortgaged property. 31 M. 33; followed in 11 O.C. 231.

A Court has no jurisdiction to sell land in contravention of the terms of S. 20 of the Oudh Laws Act XVIII of 1876 and if it does so the purchaser acquires no title. 8 O.C. 409.

A portion of a tenure cannot be sold for arrears of rent. 12 C.L.R. 398.

The superstructure of a house belonging to a bhog in a Bhogadari Village is exempt from attachment under the provisions of the Bhogadari Act V of 1862. 21 B. 588 F.B.

Pensions.—Pensions under the Pensions Act are exempt from attachment without the sanction of the Collector. Before the Pensions Act, they were liable to attachment. 79 P.R. 1867. 100 P.R. 1869. Pension means a periodical allowance or stipend granted not in respect of any right, privilege, perquisite or office, but on account of past services or particular merits or as compensation to dethroned princes, their families and dependants. 4 B. 432; 31 A. 382; 24 I.C. 805. A bonus granted by the Government is not a pension and is attachable. 5 M. 272; 6 A. 634. A Jagir, when in the nature of a pension under the Act is exempt. 137 P.R. 1890; 47 P.R. 1893; 4 P.R. 1894; 90 P.R. 1906; 17 P.R. 1907; 24 I.C. 805. But when a mortgage decree for sale of the pension is passed, it is liable to sale. 35 P.R. 1900. The mere fact that on previous occasions the judgment-debtor did not object to the attachment cannot debar him from objecting to the validity of the subsequent attachment of pension. 95 P.R. 1906. The water advantage rate though not included in the original grant of jagir (pension) is a natural increment thereto, and forms part of the jaghir and hence is exempt. 96 P.R. 1906. A grant of annual sums made by the Government in return for their having by mistake resumed certain rent-free land of the grantee is not a pension under S. 11 of the Pensions Act, and is liable to attachment. 8 O.W.N. 655; 90 M. 153. A right to receive money from Government for ever cannot be attached. 3 O. 414; 12 M. 250. Such an attachment is good only for a specific amount then payable or likely to become payable (*ibid*). An annual grant made by Government for loss to the grantee for resuming the land is not a pension and is not exempt. 8 O.W.N. 665. A grant of zamindari is not a pension. 20 A. 617. A grant of money or land revenue is not exempt. 6 M. L.T. 132. A *shikmā ghatvali* tenure held under the superior *ghatval* is not liable to be sold in execution, nor are its proceeds liable to attachment for satisfaction of the debt due from the holder. The inferior tenure cannot have larger incidents attached to it than the superior. 9 O. 388. A *toragaras haq* in the hands of the Mamlatdar

granted to him for his services rendered cannot constitute a pension within the meaning of S. 11 of the Act XXIII of 1871, so as to exempt from attachment. 4 B. 432 ; 5 M. 272 ; 5 B. 408 ; 4 B. 437 ; 4 M. 941 ; 22 B. 496 ; 29 B. 480 ; 4 B. 443 note.

Agra Land Revenue Act.—Under S. 205-B of Act XIX of 1873 property actually under superintendence of the Court of Wards is exempt from attachment, but not the property and rents of the property which may accrue after the release of the corpus from such superintendence. 24 A. 136 ; 22 A. 364.

Oudh Land Revenue Act, 1876—Where a disqualified proprietor, while his property was under the management of the Court of Wards, contracted a debt, for which the creditor obtained a decree against the representatives of the debtor after his death it was held that the provisions of S. 174 of the Act barred execution of the decree against the property which at the time the debt was contracted was under the superintendence of the Court of Wards. 4 O.C. 28.

An allowance fixed under **Bombay Act XI of 1843**, is exempt in the hands of the Collector or other disbursing officer. 10 B.H.O. 400.

Land Acquisition Act.—Compensation under the Land Acquisition Act in the hands of the Collector allowed to the mortgagor cannot be attached. 16 A. 78.

Trees which form part of an ex-proprietary holding cannot be sold in execution of a decree. Trees forming of an ex-proprietary holding can be sold. 33 I.C. 707 = 14 A.L.J. 244.

Bundelkhand Land Alienation Act, 1903.—Under this Act the land of an agriculturist is not liable to sale in execution of a money decree. 1926 A. 339 = 93 I.C. 1020.

Indian Marine Act.—The clothes, equipment, and arms of a person subject to the Indian Marine Act, are exempt from attachment. (S. 81 of the Act XIV of 1887).

A heritable but a non-transferable lease granted by a Settlement Court in Oudh cannot be sold in execution of a decree for money. 1925 O. 702.

Property of a married woman.—When property is devised to a married woman so as to be absolutely for her sole use and benefit and free from the control, debts and liabilities of her husband and a person purchased it in execution of a decree against the husband as his property with notice that she claimed it as her separate property. The purchaser could not obtain to it a title as against the wife. 1 A. 772.

A vesting order in insolvency deprives the owner of his saleable interest in the property. 22 O. 259 ; 6 O.L.R. 60.

A mere right to appeal is not liable to attachment. 15 W.R. 34 ; 321 ; 7 W.R. 311 ; 6 W.R. Mis. 14 ; 3 W.R. Mis. 16.

A mere right of suit cannot be attached. 14 W.R. 152 ; 9 C. 695 ; 6 N.W.P. 95.

A right of action is not liable to attachment. 3 W.R. Mis. 18.

The pre-emption money, deposited in court cannot be attached before the final decree in the pre-emption suit. 36 A. 98.

Panchotra.—The income of panchotra is not covered by S. 60. 73 I.C. 928.

Provided that the following particulars shall not be liable to such attachment or sale, namely :—(S. 60, proviso).

CL. (A).—The necessary wearing apparel, cooking vessels, beds and bedding of the judgment-debtor, his wife and children and such personal ornaments as in accordance with religious usage cannot be parted with by any woman.

Ornaments on the person of a Hindu wife forming part of her *stridhanam* cannot be attached in execution against her husband. 8 B.H.O. A.C. 129. Necessary wearing apparel is not liable to attachment. 9 B.H.O. 272. The *Mangalsutra*, a neck ornament which is worn by a Hindu married woman during the lifetime of her husband without ever removing it cannot be attached. 9 B. 106. The exemption is confined to such ornaments as by religious usage cannot be parted with by any woman. The debtor's property found in the *Zanana* is not protected. 17 W.R. 86.

CL. (B).—Tools of artisans and where the judgment-debtor is an agriculturist, his implements of husbandry and such cattle and seed grain as may in the opinion of the Court be necessary to enable him to earn his livelihood as such and such portion of agricultural produce as may have been declared to be free from liability under the provisions of section 61.

The fodder is liable to attachment whether in whole or in part. 93 P.R. 1904 ; 82 P.R. 1907. The court must express an opinion that the cattle sought to be exempted are necessary for the debtor to earn his livelihood. 82 P.R. 1907 ; 93 P.R. 1904 ; 56 I.C. 69 = 18 S.L.R. 210 ; 10 C. 39 ; 18 W.R. 464. The Madras High Court has ruled that this clause applies to indigent agriculturists. 25 I.O. 117. For musical instruments. See 38 I.C. 414. When an agriculturist claims exemption of his cattle from attachment, the court must inquire if they are necessary to enable him to earn his livelihood as an agriculturist. The fact that the cattle have been pledged as security for a debt will not avoid the operation of this clause. 61 I.C. 777 (A.). Articles such as a *charek*, a *kadhari*, and planks of timber, used for making jaggery are implements of husbandry and hence are exempt from attachment. 65 I.C. 415 ; 81 I.C. 679. Under S. 60 (b), C.P. Code, seed grain and cattle of agriculturist are not absolutely free from attachment. The section is only intended for the benefit of indigent agriculturists and an attachment of such cattle and seed grain is perfectly valid especially when the judgment-debtor is able to replace them without much inconvenience. 25 I.C. 117 = 1 L.W. 519. A sewing machine is exempt under this clause. 65 I.C. 416 = 19 N.L.R. 22 ; 1892 P.J. 289. An oil mill set up on a *teli's* premises is not a tool and is not exempt from attachment. 1883 P.J. 297.

CL. (C).—Houses and other buildings (with materials and the sites thereof and the land immediately appurtenant thereto and necessary for their enjoyment) belonging to an agriculturist and occupied by him.

The exemption extends to agriculturists and the houses actually occupied by them for the purposes of agriculture. 12 B. 363 ; 65 P.R. 1909 ; 13 O.P.L.R. 30 ; 59 P.R. 1902 ; 33 A. 136 ; A.W.N. (1888), 154 ; 13 A.L.J. 846 ; 7 B. 530 ; 7 Bom. L.R. 685. The exemption extends after the death of the agriculturist to his son or representative occupying the house in good faith as an agriculturist. 7 B. 530 ; 12 B. 363 ; 13 O.P.L.R. 30 ; 59 P.R. 1902. A town residence of an agriculturist is liable to attachment. 7 Bom. L.R. 685.

Agriculturist.—An agriculturist denotes a husbandman, who makes his livelihood by tillage. It does not mean a mere owner of land. 85 I.C. 700 ; 47 P.R. 1897. It extends to all persons engaged in the cultivation of land. 41 B. 475 ; 87 I.C. 564 = 1925 A 432. When a judgment-debtor is a Zamindar as well as an agriculturist, he must show that the main source of his income is derived from cultivation and that he is an agriculturist in the strict sense of the term. 40 I.C. 544 = 15 A.L.J. 540 ; 19 I.C. 125 = 11 A.L.J. 437 ; 35 A. 307 ; 35 I.C. 343 = 20 O.W.N. 874 ; 88 I.C. 543 = 26 P.L.R. 463. The party alleging that he is an agriculturist must prove that he earns his livelihood wholly or principally by agriculture or that he ordinarily engages personally in agricultural labour. 1923 Bom. 12. A judgment-debtor is not an agriculturist under this clause when his only source of living is not by cultivation. He is not entitled to any exemption under the section. 63 I.C. 681 (C.). In determining whether a house is exempt from attachment under this clause, the requirements of the agriculturist must be judged not with reference to the number of the buildings which he has kept in recent years, for he may have been subletting a portion of the land within recent years) but with reference to the possibility of his cultivating the whole of the area himself. It is not necessary that the house protected from attachment and sale should be the dwelling house of an agriculturist, provided it is occupied by him for agricultural purposes. 15 N.L.R. 83 = 51 I.C. 129 ; 14 A.L.J. 240. An agriculturist does not cease to be an agriculturist merely because he transfers his land by lease or mortgage. He still continues to be an agriculturist and the property is protected from attachment. 55 I.C. 481 = 16 N.L.R. 81, 89. An agriculturist may make a valid mortgage of his house, there being nothing contrary in S. 60 ; and after a decree on a mortgage the house may be sold in execution and the judgment-debtor is not entitled to object to the sale on the ground that it is exempt from attachment under ol. (c). 46 A. 489 ; 9 I.C. 825, 835 ; P.L.R. (1900) 357 ; *contra* in 4 B. 25 where it is *held* that such a property may be exempt under the ol. (c). The exemption does not extend to a decree on mortgage of the house not appurtenant to the holding. 4 B. 25 ; 1 P.R. 1889 ; 34 A. 26 F.B. ; 1881 P.J. 314. The contrary view is taken by the Calcutta High Court and *held* that such a house is not liable to attachment and sale. 51 I.C. 553 ; see also 13 A.L.J. 840. This exemption is subject to S. 60 (2) (a), and therefore does not extend to decrees for rents for such houses. 4 B. 429. When a judgment-debtor gave consent to the sale of his dwelling house in execution in default of payment and it was incorporated in the decree, he is barred from objecting to the attachment. 24 C.W.N. 575 = 57 I.C. 249. The only house of an agriculturist is not liable to attachment and sale in insolvency. 73 I.C. 928. A judgment-debtor who is admittedly an agriculturist does not cease to be so merely because he has turned to be an Akali, so as to render the house occupied by him liable to attachment in execution. 7 L.L.J. 95. The term "agriculturist" means etimologically one versed in agriculture but is not used in this sense in ol. (c). It is used to denote a person making his living by tilling the soil. It does not necessarily mean only a person who works with his hands. It means and includes a small holder of land who tills the soil and cultivates it. A large landed proprietor, even though his sole income is from land is not an agriculturist within the meaning of ol. (c). 1926 M. 350 = 49 M. 227 ; 12 B. 363 ; 7 B. 530.

Sites are also exempt. This was not so under the old Code. 59 P.R. 1902 ; A.W.N. (1882) 13. If the judgment-debtor allowed the auction of his house to take place without objection, the sale becomes conclusive between the parties and the judgment-debtor could not object on the ground that the house was exempt under cl. (c) in a suit for actual possession by the purchaser. 40 A. 680. The house of an agriculturist which is appurtenant to his holding is exempt. 33 A. 136. A vacant site used by an agriculturist for storing manure and fodder with no building erected thereon does not come within the purview of this clause. 21 P.L.R. 1917 = 39 I.O. 375.

Burden of proof.—The onus of proof lies on the debtor to show that he has a right to this exemption. 28 B. 125 ; 37 B. 415 ; 35 A. 807. When a Zamindar in possession has made out a case *prima facie* and the judgment-creditor attaches a ryot's homestead, the onus of proving the liability of the tenure to satisfy the debt is on the latter. 5 W. R. 293. When a Zamindar lost his proprietary rights and became an ex-proprietary tenant and his heirs also acquired occupancy rights and continued to live in the house and mortgaged it ; held that the house was saleable in a decree on the mortgage and that the mere fact that the mortgagor was a cultivator and lived in the house was insufficient to prove that the house was appurtenant to the holding. 13 A.L.J. 846 = 30 I.O. 549. The house of an ex-proprietary tenant is not exempt. A.W.N. (1882) 13. A house in which the judgment-debtor cultivator resides as well as the house in which he keeps the implements of agriculture is exempt. 14 A.L.J. 240 = 33 I.O. 727. A homestead in the town of Comillah is not liable to attachment and sale. 1 I.O. 362 = 13 C.W.N. 541. A house in a town belonging to a family which lived by cultivation is not appurtenant to agricultural holding. 45 I.O. 546. An unused *khurli* is liable to attachment in execution of a decree, 65 P.R. 1909. Even though an agriculturist has two other houses on his land expressly meant to be used for agricultural purposes, his house in a city where he spends his nights and brings his cattle every night from his land is exempt under this clause. The words "occupied by" mean "lived in by or used for agricultural purposes by." 1926 L. 280 = 92 I.O. 759.

CL. (D).—Books of account are exempt.

3 B.H.O. O.C. 42 ; 3 N.W.P. 334.

Books of account may be attached to prevent a judgment-debtor from making away with his books and defeating a decree-holder when execution is applied for by attachment of debts. 3 N.W.P. 334.

CL. (E).—A mere right to sue for damages.

14 W.R. 152 ; 14 M.I.A. 40 P.O. ; 3 W.R. Mis. 18 ; 6 N.W.P. 95.

Mesne profits are in the nature of damages. If such a right is sold in execution proceedings, the auction-purchaser has no right to sue on that basis. 9 O. 695. A right to improvements of a *mulgani* tenant cannot be attached. 36 M.L.J. 92. A right to sue for damages arising out of a breach of contract is not a debt within the meaning of O. 21, r. 46 and is not attachable. 78 I.O. 409. The mere right to sue for damages in the case of a bankrupt is restricted to damages arising from bodily or mental suffering or injury to person or reputation. 76 I.O. 657. A decree may be attached. 15 W.R. 34. A right to appeal cannot be attached. 3 W.R. Mis. 16. The right of a *mulgani* tenant in South Canara, to improvements cannot be attached. 48 I.O. 705 = (1918) M.W.N. 887.

OL. (F).—Any right of personal service.

A *vr̥t̥i* is a right to receive certain emoluments as a reward for personal service and is exempt. 23 B. 131. *Apadhikasama vr̥t̥i* of the Godavari in Nasik is exempt. 10 B. 395. *Jotish vr̥t̥i* is exempt. 12 B. 366. *Mahabrahmin vr̥t̥i* is exempt. 16 W.R. 171; 41 A. 656. On appeal from 43 I.C. 650; 39 A. 196; 10 C. 73; A.W.N. (1889) 169; 10 B. 395; 12 B. 366; 23 B. 131; 6 B.H.C.R. 137; 9 B.H.C.R. 99. It is a right to officiate as a priest at the funeral ceremony of Hindus dying within a particular district. (*ibid*). The right of a shebait to worship idol is exempt. 5 B.L.R. 617; 14 W.R. 266; 15 W.R. 339; 6 B.L.R. 727; 7 W.R. 266; 6 B. 300; 17 C. 557; 6 M. 76; 5 B. 393; 6 B. 298; 23 B. 131. (*Contra* in 6 B. 596 and 15 C. 329). If the property is bequeathed to an idol with the surplus income to go to the family of the deceased, the interest in such surplus of the representatives of the deceased is liable to attachment. 6 I.A. 182 P.C. An *archaka's* office is exempt. 4 M. 391. A Ghatwali tenure is exempt. 39 C. 1010. *Birt Jijmani* is a right to personal service and exempt. 41 A. 656. A *vr̥t̥i* can be sold if a decree of Court expressly directs such a sale. 8 B. 185. In the case of a private endowment an alienation of a shebait's office made with the consent of the whole family and for the benefit of the endowment would be valid. 17 C. 557; 23 B. 131; 34 C. 838. The *jat̥ri bahis* of a Gayawal are not attachable and saleable in execution. They are merely entries as to the names and addresses of the pilgrims who deal with the Gayawal and represent the claim of the judgment-debtor to personal service. 3 Pat. L.T. 603=68 I.C. 944. A *swasthwach̥ka* service inam land burdened with the performance of service of a public nature cannot be attached and alienated under S. 6 (h) of the T.P. Act. 45 M. 620. A private alienation of a *vr̥t̥i* is not absolutely prohibited. 23 B. 131; 8 B. 185. If the surplus profits of a shebaitship be sold to the next shebait, his right to succeed to the management would be unaffected by execution proceedings during the lifetime of the predecessor. 7 B. 188. The interest of a servant of a temple in land which he held as remuneration for his services is liable to attachment. 6 B. 596. A future perquisite on account of offering or *bhog* to the deity is not liable to attachment. 55 I.C. 175=1 Pat. L.T. 75; 42 I.C. 390=126 P.L.R. 1917; 4 A. 81; 29 C. 470.

OL. (G).—Stipends and gratuities allowed to pensioners of the Government or payable out of any service family pension fund notified in the Gazette of India by the Governor General in Council in this behalf, and political pensions.

This clause does not exempt private pensions or those payable by a body other than Government. A pension payable by a University does not fall under this clause. 75 I.C. 945.

Gratuity is a bonus allowed by Government to its servants in consideration of past services and is exempt from attachment. 6 A. 173; 5 M. 272. A gratuity sanctioned in favour of a Railway employee subsequent to 1st July 1882, but not yet handed over to him by the District pay-master is not liable to attachment. 6 A. 634; 5 Bom. L.R. 454. A bonus when paid may be transferred like any other thing. 5 M. 272; 6 A. 173; 18 C. 216 (P.C.).

Political Pensions.—Stipends allowed to members of the Mysore family are political pensions. 7 W.R. 169. Stipends allowed to the descendants of the Nawab of Carnatic are political pensions. 4 M.H.C.R. 277. Stipends allowed for the benefit of the members of the family of the late king of Oudh are similarly exempt. 18 C. 216. Pensions allowed to civil or military officers or to a Yeomadar for services are such pensions. 5 M.H.C. 371; 26 M. 69. Stipends allowed to the members of the last reigning family of Ceylon are exempt. 26 M. 429.

All pensions (periodical payments of money) of a political nature payable directly by the Government of India are exempt. 24 I.O. 805; 31 A. 382; 18 O. 216; 26 M. 423; 18 C. 216 P.C.; 26 A. 617; 5 B. 249. The character of the pension remains unchanged so long as it remains unpaid in the hands of the Government. 26 M. 69; 12 O.C. 323; 5 M. H. O. 371; 1 B. 375; 17 I. C. 181; 18 M. 187. Pensions granted by the railway company to their servants are not political pensions. 6 C.L.R. 19. A Government Sannad purported to grant the taluks of a certain Pargana together with all lands cultivated or uncultivated to one K for life as revenue free jagir by way of maintenance and went on to say that after the death of K the said ilaga will continue to stand in the names of his children and grandchildren as a permanent Zamindari assessed to a light amount of Jama, held that the grant to K was of land, rather than of revenue charged on the land and was not a political pension. 22 O. W. N. 577 P. O. The word pension is used in the sense of periodical allowances or stipends granted not in respect of any right, privilege, perquisite or office, but on account of past services or particular merits, or as compensation to dethroned Princes, their families or dependants. 4 B. 432; 5 M. 272; 30 M. 153; 31 A. 382; 16 B. 731; 21 M. 105; A.W.N. (1902) 161; 26 A. 617; 8 O.W.N. 665. A zamindari Maurusi holding substituted for a political pension is not such a pension. 31 A. 382. The word pension in S. 11 of the Pensions Act and S. 60 (1) (g), C.P. Code, implies periodical payments of money by the Government to the pensioner in the manner prescribed by S. 8 of the Act. When as a return for good services land was granted once for all under a sannad by the Government the grantee took the proprietary right in the subject of the grant which was transferable and attachable. 26 A. 617; 30 A. 153; 31 A. 362. A grant of land by Government for political services to a person as an absolute estate in the property to his descendants is not a political pension. 36 A. 318. Certain shares out of certain revenue given by the Government to the members of a certain family are not pensions within the meaning of Pensions Act and not exempt from attachment. A.W.N. (1900) 161. A *todagaras* is not a pension, but the life interest of a judgment-debtor in it may be attached. 10 Bom. L.R. 1201; 4 B. 432. A pension awarded by the deed of Trust on the part of Muhammad Ali Shah, King of Oudh is a political pension and cannot be attached. 1 O.C. 170. Pensions payable by the British Government only are exempt. A sum of money paid as a charity allowance out of the revenues of Mamdot estate may be attached. 58 P.R. 1884. A Jagir when a pension is not liable to attachment in the hands of the successor of the judgment-debtor. 9 O. 187 P.C.; 10 C. 677; 9 B. 198; 5 Bom. L.R. 983; 34 C. 753; 137 P.R. 1890; 4 P.R. 1894; 90 P.R. 1907; 17 P.R. 1907; 92 P.L.R. 1904. Income from jagir is not exempt. 57 P.R. 1884; 133 P.R. 1888; 47 P.L.R. 1893. When a mortgage decree for sale of a jagir is passed the liability of a jagir to sale depends on whether it is a pension or not under cl. (g). 35 P.R. 1905. A judgment-debtor who has pledged his pension in security of his debt is allowed to avail of the provisions of this clause. A.W.N. (1881) 147; 1878 P. J. 171. When money has once passed from Government to the payee, it is liable to attachment. 12 O. C. 323. When the pension money has virtually become the property of the judgment-debtor and is lying in deposit in the Government treasury at his call, it is not exempt from attachment. 79 P.R. 1867. Pensions granted by the Bank of Bengal are not exempt under this clause. 6 C.L.R. 19. Arrears of *wasika* allowance which accrued due in the lifetime of the *wasikadar* are not liable to attachment in the hands of the heirs of the deceased. 49 I. O. 511. A sum of money payable by special arrangement to the judgment-debtor out of the increased revenue from family estate formerly held upon an "ubari" tenure is not a pension. A.W.N. (1902) 161. A hereditary right to an allowance payable annually from the *melwaram* of an estate is not exempt under this clause. 30 M. 279. A grant of land for political considerations for life to the grantee and as an absolute estate to his descendants is not a pension and is not exempt. 36 A. 318; 47 I.O.

632—22 C. W. N. 577. Where a pension is made liable under the terms of a decree, the judgment-debtor cannot contend in execution of the decree that the pension is exempt from attachment and sale. 89 I.C. 364—1925 A. 652.

The stipends and gratuities payable by the undermentioned Family Pension Funds are declared exempt from attachment or sale in execution of a decree of court of law. (1) The Bombay Uncoovenanted Service Family Pension Fund. (2) The Bengal Uncoovenanted Service Family Pension Fund. (3) The Bengal and Madras Service Family Pension Fund.

[See Gazette of India, 1909, Pt. I. p. 5].

OL. (H).—Allowance (being less than salary) of any public officer or of any servant of a railway company or local authority while absent from duty.

These are exempt whether before or after they are actually payable (Explanation to S. 60.) The ruling 6 M. 179 which exempted only a moiety of the salary of a public officer drawing half pay on sick leave is no longer law now.

OL. (I).—The salary or allowances equal to salary of any public officer or of any public officer or of any servant of a railway company or local authority while on duty, to the extent of—

- (i) the whole of the salary where the salary does not exceed forty rupees monthly ;
- (ii) forty rupees monthly where the salary exceeds forty rupees and does not exceed eighty rupees monthly, and
- (iii) one moiety of the salary in any other case.

The salary may be attached when not exempt even in advance. 6 M. 179 ; 6 C. L. R. 19. A British Officer in the Indian Army is a public officer within the meaning of S. 2 (17), O. P. Code, and his pay is liable to attachment under S. 60, ol. (i), 39 A 308 ; 43 B. 716. A Khot is not a public officer. 13 B. 673. An officer of the Indian Staff Corps is a public officer within the meaning of the ol. (h). The pay of such officer is liable to attachment. 24 C. 102 ; 25 M. 402. The pay of the officer of a Regular Force is not liable to attachment. 24 C. 102 ; *contra* 59 P. R. 1867. The salary of a railway employee may be attached. 10 W. R. 447. The salary of an insolvent is governed by these rules. 40 A 213 ; 18 C. W. N. 1053 = 21 I.C. 950 ; 38 I.C. 410. The salary of a telegraph officer which has become due may be attached. 18 W.R. 125. Similarly the salary of a peon under the service of a Mamlatdar under the Government may be attached. 7 B.H.C.A.C. 110 ; 21 M. 393. The salary may be attached at or about the time when the agent of the disbursing officer goes to hand it over to the railway servant. 7 C.W.N. 821. The portion of the salary which is exempt is not liable to attachment even after it is due. see S. 60 (2). Under the old law it could be attached as a debt after it had become due. 24 W.R. 446. The official emoluments of the officiating hereditary officer is not liable to civil process in the hands of the Collector. 10 B.H.C. 400 ; 12 O.C. 323. S. 60, O.P. Code, provides that nothing in that section affects the Army Act, 1881, hence the attachment of half the salary which does not exceed Rs. 40 of a judgment-debtor subject to military law is legal. 9 M. 170. Under the Code of 1859 the whole

of such salary was liable to attachment when it became due. 7 B.H.C.R. 110. It is no reason for exemption that the debtor was a European and his pay was not large enough to admit of half of it being attached. 40 A. 213. An Honorary Commissioned Officer employed in the Indian Subordinate Medical Department is a public officer. 23 I.O. 935=17 O.C. 99. The salary of a private servant is not exempt from attachment. 31 A. 304; 21 M. 393. The particulars mentioned in this clause are exempt whether before or after they are actually due (Explanation to the section). The pay of an Army Assistant Surgeon who is a warrant officer, under the Army Regulation is exempt from attachment in execution of a Civil or Revenue Court decree, whether the Assistant Surgeon was recruited under British conditions or in India. 89 I.O. 882=L.R. 6 A. 528 Civ.

CL. (J).—The pay and allowances of persons to whom the Indian Articles of War apply.

The pay of an officer of a regular force or of a soldier is exempt. The Indian Articles of War apply only to soldiers and followers of the Native Army. 1 A. 790; 7 N.W.P. 331. A non-commissioned officer is merely a soldier and is not an officer within S. 136 of the Army Act and therefore his pay is under S. 144 of the Act exempt from attachment in execution of a decree of a Civil Court. 42 I.C. 90=11 Bur. L.T. 130. When however it has been so attached and sold, there cannot be an order for refunding the same. 38 B. 667. The particulars mentioned in this clause are exempt whether before or after they are actually payable. (Explanation to the section). The Indian Articles of War must now be regarded as referring to Army Act, VIII of 1911, and as an Army Assistant Surgeon is included under S. 2, Army Act, as warrant officer his pay is not attachable even if he is recruited in India. 1926 A. 122 (2)=89 I.O. 882.

CL. (K) —All compulsory deposits and other sums in or derived from any fund to which the Provident Funds Act 1897, for the time being applies in so far as they are declared by the said Act not to be liable to attachment.

S. 2 of the Provident Funds Act, 1897, defines the "compulsory deposits" as a subscription which is not repayable on the demand or at the option of a subscriber or depositor and includes any contributions which may have been credited in respect of any interest or increment which may have accrued on such subscription or deposit under the rules of the Fund. Compulsory deposits made by railway servants under the Act are exempt. So long as the deposit remains on the hands of the railway company it retains the character of a compulsory deposit. 29 B. 259; 98 C. 641; 9 M. 203. A deposit in a Provident Fund which, so long as the subscriber was in service, was a compulsory deposit within the meaning of S. 2 (4) of the Provident Funds Act, does not become attachable by a creditor the moment the subscriber retires irrespective of whether it has been drawn out or not. 45 A. 554. Compulsory deposits made in a State Railway Provident Fund by an officer of the railway during his employment are not liable to attachment in execution of a money decree against him, even though he has ceased to be in the service of the Railway at the time of execution. The rules regulating the General Provident Funds do not apply to the State Railway Provident Fund. The fact that the deposits became repayable to the officer after he left the service does not remove them from the category of compulsory deposits. 50 C. 347. A compulsory deposit is a deposit which goes into the fund as a compulsory deposit within the meaning of S. 4 (1) of the Provident Funds Act and is at that date received and classified as such and so long as such a deposit subsists in the fund, it continues

to be compulsory deposit irrespective of the fact that it is liable to withdrawal on the death or retirement of the depositor under r. 22 of the Rules contained in Appendix I, Volume II of the State Railway Co-operative Code. A compulsory deposit includes the sums deposited by the depositor himself and the contributions in respect of the deposits made by the Railway and the interest or increment accrued on them. 82 I.C. 69—1923 O. 585; 46 C. 962; 44 B. 673; 80 I.C. 424—3 P. 74. The Provident Fund established by the Corporation of Calcutta to which the provisions of the Provident Funds Act IX of 1897 and afterwards Act IV of 1903 were made applicable by the Local Government notification, dated 8th July 1901, is not liable to attachment. 35 O. 641. Money deposited under rules of the Company in a Provident Fund can be attached only if the rules allow it. A.W.N. (1897) 88. The money in such funds is protected from attachment by creditors even after the death of the subscriber. 46 C. 962.

CL. (L).—The wages of labourers and domestic servants whether payable in money or in kind.

A labourer is a person who earns his daily bread by personal labour or in occupations which require little or no skill, art or previous education. 5 B. 132. Job workers (spinners) at a mill are labourers. 5 B. 132. Wages of coolies in the hands of a sardar are exempt. 10 W.R. 149. Similarly wages of domestic servants are exempt. 8 B.L.R. 244. The wages of a private servant are exempt. 21 M. 293. Under the present Code they are exempt even after they are payable. See Explanation to S. 60 (2). Sweepers employed by a municipality are labourers and their wages are exempt from attachment. 1881 P.J. 120. A tomtom beater to a temple, if he resides in the temple may be regarded as a domestic servant. 1881 P.J. 147.

CL. (M).—An expectancy of succession by survivorship or other merely contingent or possible right or interest.

This clause relates to two exemptions: (1) an expectancy of succession by survivorship, and (2) other merely contingent or possible right. 78 I.C. 881. (1) **Expectancy of succession by survivorship** is not liable to attachment. 22 B. 984; 6 C.L.R. 528. The interest of an heir expectant on the death of a widow or female in possession is not liable to attachment. 15 W.R. 17 F.B.; 29 C. 355; 6 W.R. 34; 29 M. 120. The right of a son to succeed by survivorship is not liable to attachment. 8 W.R. 253; 22 B. 984; 4 N.W.P. 137. But the interest of a son or grandson in a Joint Hindu Family governed by mitakshara law is liable to attachment. 5 A. 430; 3 C. 198; 4 C. 809. The remainder vesting in a widow is liable to attachment by the husband's creditors. 30 I.C. 101—29 M.L.J. 546. The interest of a grantee of a life interest, a Hindu widow or mother, in the usufruct of certain lands is liable to attachment. 10 A. 462. A present gift with a postponed payment creates a vested interest. 1926 M. 371—92 I.C. 1021. (2) **Merely contingent or possible right.**—The interest of a successful plaintiff in the pre-empted property is a merely contingent right until the payment of the pre-emptive price. 23 A. 383. The chance of an heir apparent succeeding to an estate under Mahomedan Law is exempt. 9 C.L.J. 50; 53 P.R. 1894; 31 B. 165. The right of a vendor in the balance of purchase-money payable on the execution of a conveyance is exempt from attachment so long as the conveyance is not executed. 3 A. 12. The life interest which a judgment-debtor would be entitled to in an estate after the payment of certain charges is not liable to attachment. 6 M.L.A. 510. Where a person has acquired a certain right of property on the happening of a certain event, it is not a mere expectancy or other merely contingent or possible right or interest but an interest capable of

being attached and sold. 13 C. 164 P.C. ; 22 C. 33 ; 143 P.L.R. 1905 ; 32 B. 172 ; 13 A. 432 F.B. ; 17 B. 503 ; 10 C. 109 ; 6 B.L.R. 625 ; 11 C.W.N. 403 ; 9 B.L.R. 295 ; 30 C. 599 F.B. A resulting trust is not a mere expectancy or contingency. Such a trust in favour of a person passes on his insolvency to the official assignee and becomes vested in him. 1 Bom. L.R. 303. Where A sold certain property to B and a sum of three lakhs was left with the vendee to pay off a mortgage on the property, it being stipulated that if the mortgage amount turned out less the balance should be paid to the vendor *held* that the interest of the vendor in the sum of three lakhs in the hands of B was a mere contingent right and not liable to attachment. 78 I.C. 881 (O.). The life interest in the residue property of a testator cannot be attached. 4 W.R. 87 P.C. Future offerings to a deity cannot be attached. 29 C. 470. A vested remainder can be attached because it is not a merely contingent impossible right. 17 B. 503 ; 18 C. 164 ; 32 M. 172 ; 12 B. 250. Presents to be made to Gayawal cannot be attached. 19 C. 730. If the *khai* (offering to the deity) be in the nature of a future perquisite on account of the offerings or bhog to the deity, it will be an uncertain and indefinite income which cannot be attached, a priestly office with emoluments attached to it being inalienable. 55 I.C. 175=1 Pat. L.T. 75 (1 M. 35 ; 23 M. 27 ; 4 A. 81, followed).

CL. (N).—A right to future maintenance.

2 Hay 142 ; 4 W.R. 87 P.C.

Arrears of maintenance may be attached but not future maintenance. 40 M. 302 ; 6 W.R. Mis. 64 ; 27 C. 38 ; 38 C. 13 ; 7 W.R. 311 ; 23 W.R. 427 ; 15 W.R. 188 ; 1 Hay 583 ; 30 M.L.J. 361 ; 12 C.L.J. 161 ; 15 A. 371 ; 15 M.L.J. 7 ; 5 W.R. 111 ; 10 B. 342 ; 10 C. 521 ; 19 A.L.J. 648 ; 24 W.R. 5 ; 6 I.A. 183 P.C. ; 47 A. 385. Crops on land allowed to a widow for maintenance are liable to attachment. 22 M. L.J. 204=13 I.C. 152. When certain properties are given to a member of a Malabar Tarwad in lieu of maintenance under a *karar* which prohibits alienation except by way of lease, his interest in the property is not exempt from attachment. 30 M. 266 ; 12 C. L.J. 146 ; 29 I.C. 578. A decree for maintenance is a future right and can be attached. 5 I.C. 879=26 M.L.J. 97 ; 30 M.L.J. 361 ; 6 B.L.R. 646=15 W.R. 188. Where the younger brother was granted a property for maintenance under a compromise arrived at between the brothers in a litigation and the property was not to be sold during the lifetime of the elder one it did not amount to a right to maintenance under S. 60 (m), and the property was not exempt from attachment. 43 A. 617. The clause contemplates the right of a particular individual to be maintained. It is purely a personal right and does not include an annuity conferred by a will especially when the allowance is not personal but heritable. Future instalments of such an allowance are not therefore exempt from attachment and a prohibitory order can be passed in respect of such allowance under O. 21, r. 46, C.P. Code. 63 I.C. 851=24 O.C. 250. The true test is whether the intention of the grantor was to create a purely personal right, to receive a certain sum of money in the grantee and consequently inalienable, or whether his intention was to create an interest in property, either a fund or an estate, which should be treated as alienable property. 7 I.C. 80=12 C.L.J. 146. Land assigned to a Hindu widow for maintenance with a proviso against alienation is land over which she has no power of disposal and as such is exempt from attachment in execution of a money decree against her. 10 B. 342 ; 15 M.L.J. 7 ; 15 A. 371 ; 16 A. 443 ; 9 C.W.N. 309 ; 12 C.L.J. 146 (*contra* in 14 C.P.L.R. 114). A heritable right to receive a monthly allowance derived from a person's deceased wife to whom it was assigned in lieu of her share of landed property is not a mere right to maintenance and not exempt from attachment. 10 C. 521. A heritable annuity granted under a

will is not a right to future maintenance and is attachable. 24 O.O. 250. A future right can be attached. 2 Hay 142. A hereditary grant of an allowance of paddy out of the melwaram of certain land is not a right to future maintenance. 30 M. 279. A right to receive money charged upon property and enforceable if necessary by sale is not future maintenance. 17 I.C. 284=17 C.W.N. 662. An interest taken by a will can be attached. 23 B. 1. An annuity charged on an estate is exempt from attachment. 16 O.L.J. 354. When certain properties are given to a member or widow in lieu of maintenance the interest of such person in the property can be attached. 29 I.C. 578; A. W.N. (1883) 9. The interest of a grantor to a widow as maintenance for life interest can be attached. 10 A. 462.

CL. (O).—Any allowance declared by any law passed under the Indian Councils Acts, 1861 and 1892, to be exempt from liability to attachment or sale in execution of a decree.

The particulars mentioned in this clause are exempt whether before or after they are actually payable (Explanation to the section).

CL. (P).—When the judgment-debtor is a person liable for the payment of land revenue, any moveable property which under any law for the time being applicable to him is exempt from sale for the recovery of an arrear of such revenue.

PARTIAL EXEMPTION OF AGRICULTURAL PRODUCE.—The Local Government, with the previous sanction of the Governor General in Council, may by general or special order published in the local official gazette declare that such portion of agricultural produce or of any class of agricultural produce as may appear to the Local Government to be necessary for the purpose of providing until the next harvest for the due cultivation of the land and for the support of the judgment-debtor and his family, shall, in the case of all agriculturists, or of any class of agriculturists be exempted from liability to attachment or sale in execution of a decree. (S. 61.)

Trees generally follow the condition of the land on which they grow but if they are transferable by custom they may be attached. 5 A. 616; 9 A. 88. Standing crops are not liable to attachment. 11 M. 193; 14 A. 30; *contra* in 26 I.C. 684.

III.—MODES OF ATTACHMENT.

ATTACHMENT IN CASE OF DECREE FOR RENT OR MESNE PROFITS OR OTHER MATTER AMOUNT OF WHICH TO BE SUBSEQUENTLY DETERMINED.—Where a decree directs an inquiry as to rent or

mesne profits or any other matter, the property of the judgment-debtor may, before the amount due from him has been ascertained, be attached, as in the case of an ordinary decree for the payment of money. (O. 21, r. 42.)

SCOPE.—This rule provides for attachment in cases where a final decree is passed. Property of the judgment-debtor may in such cases be attached before the final decree is passed. 8 W.R. 9. The decree-holder can attach the property of his judgment-debtor on account of mesne profits which will have to be assessed but have not yet been assessed. 16 I.C. 708. An enquiry into the state of accounts under S. 92, O.P. Code, with a view to ascertain the liability of the trustee if any towards the trust fund is an enquiry into a matter *ejusdem generis* with an enquiry into questions of mesne profits and is thus covered by O. 21, r. 42. 41 I.C. 89. This rule does not apply to a suit for partnership account, as the preliminary decree to take partnership accounts cannot be executed and an order for execution in respect of such a decree cannot be passed. 1926 S. 178.

ATTACHMENT OF MOVEABLE PROPERTY IN POSSESSION OF JUDGMENT-DEBTOR.—Where the property to be attached is moveable property other than agricultural produce in the possession of the judgment-debtor, the attachment shall be made by actual seizure and the attaching officer shall keep in his own custody the property, or in the custody of one of his subordinates and shall be responsible for the due custody thereof :

Provided that when the property is subject to speedy and natural decay or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once. (O. 21, r. 43.)

ACTUAL SEIZURE.—When a warrant of attachment is affixed on the outer door of the warehouse in which the goods of the judgment-debtor are stored, it amounts to actual seizure of such goods. 27 M. 346. A prohibitory order involves no change of possession. 1 L.W. 162.

SAPURDDAR.—See *infra*.

MOVEABLE PROPERTY.—Oil and Flour Mills and a Steam Engine and boiler are fixtures and not goods and chattels within the meaning of S. 58 of the Small Cause Courts (Muffassil Act, IX of 1850), and cannot be seized in execution of a Small Cause Court decree. 4 C. 946. Moveable property includes growing crops. S. 2 (13). Under the old Code these were held to be immoveable property. 6 B. 592; 11 M. 193; 14 A. 90; 13 B. 87. Trees before their severance from the ground are immoveable property. 10 A. 20; 13 C. 262; 19 B. 207; 24 W.R. 394. Tiled huts are immoveable property. 81 C. 340; 4 C.W.N. 470; 10 W.R. 416.

ATTACHMENT OF AGRICULTURAL PRODUCE.—Where the property to be attached is agricultural produce the attachment shall be made by affixing a copy of the warrant of attachment,—

- (a) where such produce is a growing crop, on the land on which such crop has grown, or
- (b) where such produce has been cut or gathered, on the threshing floor or place for treading out grain or the like or fodder-stack, or in which it is deposited, and another copy on the outer door or some other conspicuous part of the house in which the judgment-debtor ordinarily resides or with the leave of the Court, on the outer door or on some other conspicuous part of the house in which he carries on business or personally works for gain or in which he is known to have last resided or carried on business or personally worked for gain ; and the produce shall thereupon be deemed to have passed into the possession of the Court. (O. 21, r. 44.)

PROVISIONS AS TO AGRICULTURAL PRODUCE UNDER ATTACHMENT —

(1) Where agricultural produce is attached, the Court shall make such arrangements for the custody thereof as it may deem sufficient and for the purpose of enabling the Court to make such arrangements, every application for the attachment of a growing crop shall specify the time at which it is likely to be fit to be cut or gathered.

(2) Subject to such conditions as may be imposed by the Court in this behalf, either in the order of attachment or in any subsequent order, the judgment-debtor may tend, cut, gather and store the produce and do any other act necessary for maturing or preserving it ; and, if the judgment-debtor fails to do all or any of such acts, the decree-holder may, with the permission of the Court, and subject to the like conditions, do all or any of them, either by himself, or by any person appointed by him in this behalf, and the costs incurred by the

decree-holder shall be recoverable from the judgment-debtor as if they were included in, or formed part of, the decree.

(3) Agricultural produce attached as a growing crop shall not be deemed to have ceased to be under attachment or to require re-attachment merely because it has been severed from the soil.

(4) Where an order for the attachment of a growing crop has been made at a considerable time before the crop is likely to be fit to be cut or gathered, the Court may suspend the execution of the order for such time as it thinks fit and may in its discretion make a further order prohibiting the removal of the crop pending the execution of the order of attachment.

(5) A growing crop which from its nature does not admit of being stored shall not be attached under this rule at any time less than twenty days before the time at which it is likely to be fit to be cut or gathered, (O. 21, r. 45.)

OBJECT AND SCOPE.—The object of the rules is to prevent injury to crops which might result, if they were attached and allowed to be removed like any other moveable property. Moreover, the mode of attachment affords the fullest value from the property attached.

AGRICULTURAL PRODUCE IN THE HANDS OF A THIRD PERSON.—O. 21, r. 46, and not r. 44 or 45, apply to the attachment of agricultural produce in the hands of a third party. 15 S.L.R. 128=64 I.O. 1007.

RULE MADE BY THE HIGH COURT OF BOMBAY.—O. 21, r. 44-A—Where the property to be attached is agricultural produce, a copy of the warrant or order of attachment shall be sent by post to the office of the Collector of the District in which the land is situate.

ATTACHMENT OF DEBT.—(1) In the case of a debt not secured by negotiable instrument, the attachment shall be made by a written order, prohibiting the creditor from recovering the debt and the debtor from making payment thereof until a further order of the Court.

(2) A copy of such order shall be fixed on some conspicuous part of the Court house and another copy shall be sent to the debtor.

(3) A debtor prohibited as above may pay the amount of his debt into Court, and such payment shall discharge

him as effectually as payment to the party entitled to receive the same. (O. 21, r. 46.)

For definition of debt see *supra*.

ATTACHMENT OF DEBT WHERE THE JUDGMENT-DEBTOR OR HIS DEBTOR LIVES OUTSIDE THE JURISDICTION OF THE EXECUTING COURT.—

A Court cannot issue a prohibitory order to a debtor if he resides outside its territorial jurisdiction. The proper procedure in such a case is that the decree-holder is to apply to the Court that passed the decree to issue a prohibitory order, on the person residing within the jurisdiction of such Court and also to apply to the same Court for a transfer of the decree to another Court within the jurisdiction of which the other of the two persons resides ; and after the decree is so transferred to apply to the Court executing the transferred decree to issue a prohibitory order upon the person in question. 39 C. 104 ; 177 P.L.R. 1915=30 I.C. 487. It is not competent to a Court in execution of a decree for money, to attach a debt payable to the judgment-debtor outside the jurisdiction by a person not resident within the jurisdiction of that Court. 22 O.W.N. 160=36 I.C. 457. When a debtor of the judgment-debtor resides outside the jurisdiction of the Court the debt cannot be attached by the executing Court, 14 C.L.J. 228 ; 28 B. 198 ; 6 A. 243 ; 39 C. 104 ; 12 B. 44 ; 30 O. 713 ; 3 O.L.R. 30 ; 4 Pat. L.J. 141. The mere fact that the debtor is at the time of the application for attachment beyond the limits of British India would not of itself render the debt not liable to attachment. 5 B. 249.

NOTICE.—Notice of attachment must be sent to the debtor. Until he receives such a notice, he is bound to pay the debt to his creditor. 7 W.R. 10 ; 15 O.O. 289=17 I.C. 420.

DEBT DUE TO THE JUDGMENT-DEBTOR.—The rule applies only when the debt is due to the judgment-debtor. When a certain debt is declared to be belonging to the plaintiff in a decree, it cannot be attached in the hands of a third party under O. 21, r. 46. 1 C.W.N. 170.

EFFECT OF ATTACHMENT OF DEBT.—See *infra*.

INVALID ATTACHMENT OF DEBT.—See *infra*.

EXISTENCE OF DEBT.—When an application for attachment of debt is made the Court is not bound to satisfy itself as to the existence of the debt. 28 A. 262 ; 27 I.C. 812 ; 78 I.C. 812=20 N.L.R. 11 ; and the Court may appoint a receiver under r. 189 of the Civil Rules of Practice (Madras). 27 I.C. 812 ; 78 I.C. 601=20 N.L.R. 11.

THE DEBTOR MAY PAY INTO COURT.—Though the debtor of a judgment-debtor may pay a debt attached by a prohibitory order under O. 21, r. 46 into the attaching Court, such payment is optional with him and he is not bound and cannot be compelled by summary process to make such payment. 95 P.R. 1886 ; 10 M. 194 ; 21 A. 145 ; 33 I.C. 169. The C. P. Code does not empower a Court attaching a debt to compel the garnishee to deposit the debt into Court if he denies it and informs the Court to that effect. 20 N.L.R. 11=78 I.C. 601. If the garnishee denies the debt, it is open to the creditor to have it sold or have a receiver appointed with power to sue the garnishee for the recovery of the debt. 35 I.C. 469=10 Bur. L.T. 6 ; 8 Bur. L.T. 91 ; 11 B. 448. A payment out of Court to the person entitled to the debt attached and certified to the Court is equivalent to a payment into Court under O. 21, r. 46. 21 A. 145.

FORGIBLE RECOVERY.—When a debtor (when the debt is attached) is obliged to pay in the debt in Court, he cannot recover the same by a suit against the decree-

holder to whom it was paid, if the debtor admitted the debt as due to the judgment-debtor. 43 A. 272. Where the deposit by the garnishee is conditional on enquiry being held as to the judgment-debtor's right, the creditor should not be allowed to withdraw the amount so deposited before the enquiry is complete and shows the right of the judgment-debtor to it. 43 C. 269 ; 43 A. 272.

SET-OFF OF A CROSS-DEBT.—Where a cross-debt is due to the garnishee from the judgment-debtor at the date of the attachment it can be set off and his liability to pay it no longer subsists. 38 B. 631.

WHEN DEBT RIPENS INTO A DECREE.—When a certain debt is attached and then a decree is obtained by the judgment-debtor in respect of that debt the decree-holder's right to recover the debt is not destroyed, and he can recover it by executing the decree passed in favour of the judgment-debtor, 1926 M. 971=92 I.C. 1021.

ATTACHMENT OF A SHARE IN THE CAPITAL OF A CORPORATION.—(1) In the case of a share in the capital of a corporation, the attachment shall be made by a written order prohibiting the person in whose name the share may be standing from transferring the same or receiving any dividend thereon.

(2) A copy of such order shall be fixed on some conspicuous part of the Court-house, and another copy shall be sent to the proper officer of the Corporation. (O. 21, r. 46.)

ATTACHMENT OF OTHER MOVEABLE PROPERTY NOT IN POSSESSION OF THE JUDGMENT-DEBTOR.—(1) In the case of any moveable property (except as provided in the two preceding headings) not in the possession of the judgment-debtor except property deposited in or in the custody of any Court, the attachment shall be made by a written order, prohibiting the person in possession of the same from giving it over to the judgment-debtor.

(2) A copy of such order shall be fixed on some conspicuous part of the Court-house and another copy shall be sent to the person in possession of the same. (O. 21, r. 46.)

An order under O. 21, r. 46 does not amount to seizure within Art. 29 of the Limitation Act. 38 M. 972, F.B.

THE ATTACHMENT OF A SHARE OF PARTNERSHIP property should be by prohibitory order, not by actual seizure. 5 B.L.R. 386 ; 45 M. 537.

PROPERTY OF THE JUDGMENT-DEBTOR.—It is incumbent on the plaintiff to prove that the property belongs to the judgment-debtor and not a third person. 25 W.R. 20.

IN THE POSSESSION OF THE MORTGAGEE.—An attachment of property in the possession of the mortgagee shall be made by a prohibitory order and not by actual seizure. 1 O.P.L.R. 85.

OTHER MOVEABLE PROPERTY.—Money deposited as security for the due performance of his duty by a railway servant in the employ of a Railway company may be attached under the rule but a sale thereof cannot be effected until the deposit is at the disposal of the judgment-debtor. 9 M. 203; 7 Bur. L.T. 238. Agricultural produce in the hands of a third person may be attached under this rule. 64 I.O. 1007—15 S.L.R. 128.

ATTACHMENT OF MOVEABLE PROPERTY DEPOSITED IN OR IN THE CUSTODY OF ANY COURT, ETC.—Where the property to be attached is in the custody of any Court or public officer, the attachment shall be made by a notice to such Court or officer, requesting that such property, and any interest or dividend becoming payable thereon, may be held subject to the further orders of the Court from which the notice is issued.

Provided that, where such property is in the custody of a Court, any question of title or priority arising between the decree-holder and any other person, not being the judgment-debtor, claiming to be interested in such property by virtue of any assignment, attachment or otherwise, shall be determined by such Court. (O. 21, r. 52.)

SCOPE.—The Court has no option to refuse an application for attachment under the rule. 8 C.L.R. 17. The money of a judgment-debtor in Court should be disposed of according to law when the judgment-debtor has not been declared an insolvent even though he put in an application. 33 I.C. 723=14 A.L.J. 236. This rule is applicable only to cases where the property is in the custody of a Court or public officer, and belongs to the judgment-debtor; and not where it has been declared to belong to a third person. 1 C.W.N. 170; 28 I.C. 123=20 C.W.N. 412.

Actual custody.—This rule applies when the property is actually in the custody of the Court or public officer and not when the property is expected to reach it. 22 B. 39; 39 B. 80; 26 M.L.J. 364; 16 C.W.N. 14=11 I.C. 422; 14 C.L.J. 127; 20 C.W.N. 412; 28 I.C. 123; 44 C. 1072.

Acquisition by Government of land covered by mortgage decree.—When before the execution of a mortgage decree for sale of land, such land was acquired by the Government under the Land Acquisition Act, 1870, and the holder of the decree failed to put in a claim under S. 9 of the Act, held that he was disentitled to attach the money in the hands of the Collector, being the amount of compensation awarded by the Government to the mortgagor. 16 A. 78.

PROPERTY IN THE CUSTODY OF THE COURT OR PUBLIC OFFICER.—Money in the hands of the Collector may be attached by the Court in the District. 3

Bom. L.R. 462. Where lands are leased under Sob. III by the Collector, an attachment of the rents of those lands can be effected only under this rule. 9 C.P. L.R. 147. Property attached yielding revenue or a periodical interest or dividend is within the meaning and contemplation of all garnishee orders under O. 21, r. 52 and such revenue, interest or dividend payable in future can be attached. 39 B. 80. A letter in the Post office is in trust for the addressee and it is liable to attachment in spite of the fact that the sender wants to get it back. 13 M. 242.

The Official Assignee is a public officer within the definition of S. 2 (17) (h), C.P. Code, and money in his hands payable by way of dividend to a creditor of an insolvent can be attached under this rule. 49 B. 638. Property deposited in the collectorate at the credit of the judgment-debtor should be ordered to be attached. The attachment should not be refused on the ground that the money is confiscated to Government. 18 W.R. 189. When property is attached by and is in the custody of one Court it can be attached only by a notice to that Court, otherwise the attachment is irregular and does not entitle the subsequent attaching creditor to rateable distribution. 11 I.C. 859.

Receiver.—A receiver is an officer of the Court. Therefore an attachment of money in the hands of a receiver made without previous permission or sanction of the Court is improper. 21 C. 85; 16 B. 577; 1 Pat L.J. 449=35 I.C. 589; 5 I.O. 390; 27 B. 556; 32 C. 198 P.C.; 34 B. 484; 1 C. 403; but see 26 A. 127. Properties in the hands of a receiver of the Court can be sold in execution of a mortgage decree though not in execution of a money decree. 26 C. 127.

PROPERTY OF THE JUDGMENT-DEBTOR.—Where a judgment-debtor paid into Court a sum of money which the decree-holder refused to take and both the judgment-debtor and the decree-holder appealed from the order of payment of the lower Court the amount so paid cannot be attached at the instance of another creditor of the judgment-debtor. The money should remain in Court, i.e., into the treasury as a civil deposit. If the amount is paid out to another creditor, the decree-holder cannot recover it again from the judgment-debtor. 15 B. 681.

ACTUAL CUSTODY.—This rule applies to property actually in the custody of the Court or officer. It does not allow of an anticipatory attachment. 44 C. 1072; 22 B. 39; 39 B. 80; 24 I.C. 617=26 M.L.J. 364; 11 I.C. 422=1 C.W.N. 14; 12 M. 250.

NOTICE.—Attachment should be made by a notice to the Court. 4 Bur. L.T. 192; 11 I.C. 859; 7 Bur. L.T. 277=26 I.C. 961; 28 I.C. 123=20 C.W.N. 412. A sale of the foreclosure decree while the estate was in the possession of the receiver in execution of a decree for money without leave of the Court previously obtained is illegal and liable to be avoided. 5 I.O. 390. When the property to be attached is deposited in the Court which made the order for attachment, that order is a sufficient notice that the property ordered to be attached is to be held subject to the further orders of the Court, and it is not necessary that further formal notice should be drawn up. 17 A. 82. An attachment without notice to the Court is bad. 11 I.C. 859=4 Bur. L.T. 192; 19 W.R. 37.

DETERMINATION OF QUESTION OF TITLE OR PRIORITY.—Any question of title or priority arising between the decree-holder and any other person except the judgment-debtor is to be determined by the Court which made the order of attachment. 7 C. 553; 19 B. 710. It is the custody Court and not the attaching Court that can make an enquiry into the question of priority under O. 21, rr. 58-63. 39 I.C. 345=2 U.B.R. (1916) 136. The enquiry under this rule is subject to all the provisions of rr. 58-63. 19 C. 286; 39 I.C. 345. A regular suit under O. 21, r. 63 will lie for setting aside an order such as is contemplated by the proviso. 19 C. 286.

AS TO PRIORITY—See CHAPTER IX—"RATEABLE DISTRIBUTION."

COURT OF APPEAL.—When the holder of a decree of the District Munsiff's Court attached a sum of money which was realised in execution of a decree in favour of his judgment-debtor in the Court of a Subordinate Judge and obtained an order from the Court of the Subordinate Judge for payment of the sum to him, an appeal against the order of the Sub-Court lay to the District Court and not to the High Court. 5 L.W. 264=78 I.O. 772; 1925 C. 354.

ATTACHMENT OF NEGOTIABLE INSTRUMENTS.—Where the property to be attached is a negotiable instrument, not deposited in a Court, nor in the custody of a public officer, the attachment shall be made by actual seizure, and the instrument shall be brought into Court and held subject to further orders of the Court. (O. 21, r. 51.)

The proper method of attaching a promissory note in the hands of a private person is by its actual seizure under this rule and not by the issue of a mere prohibitory order. 46 M. 415.

ATTACHMENT OF SHARE IN MOVEABLES.—Where the property to be attached consists of the share or interest of the judgment-debtor in moveable property belonging to him and another as co-owners, the attachment shall be made by a notice to the judgment-debtor prohibiting him from transferring the share or interest or charging it in any way. (O. 21, r. 47.)

SCOPE.—Such an interest is incapable of actual seizure, and hence a special provision is made for its attachment. 5 B L R. 396. In the case of moveables, the code makes production or seizure of the property essential only when it is in the debtor's hands or is a negotiable instrument and not when it is in the possession of a co-owner. (1915) M.W.N. 159=28 I.C. 62.

ATTACHMENT OF SALARY OR ALLOWANCE OF PUBLIC OFFICER OR SERVANT OF RAILWAY COMPANY OR LOCAL AUTHORITY.—(1) Where the property to be attached is the salary or allowances of a public officer or of a servant of a railway company or local authority, the Court, whether the judgment-debtor or the disbursing officer is or is not within the local limits of the Court's jurisdiction may order that the amount shall, subject to the provisions of section 60, be withheld from such salary or allowances either in one payment or by monthly instalments as the Court may direct; and, upon notice of the order to such officer as the Government may by

notification, in the Gazette of India, or in the local official Gazette, as the case may be, appoint in this behalf, the officer or other person whose duty it is to disburse such salary or allowances shall withhold and remit to the Court, the amount due under the order, or the monthly instalments as the case may be.

(2) Where the attachable proportion of such salary or allowance is already being withheld and remitted to a Court in pursuance of a previous and unsatisfied order of attachment, the officer, appointed by the Government in this behalf, shall return the subsequent order to the Court issuing it with a full statement of all the particulars of the existing attachment.

(3) Every order made under this rule, unless it is returned in accordance with the provisions of sub-rule (2) shall, without further notice or other process, bind the Government or the railway company or local authority, as the case may be, while the judgment-debtor is within the local limits to which this Code for the time being extends, and while he is beyond those limits, if he is in receipt of any salary or allowances payable out of His Majesty's Indian revenues or the funds of a railway company carrying on business in any part of British India, or local authority in British India; and the Government or the railway company or the local authority, as the case may be, shall be liable for any sum paid in contravention of this rule. (O. 21, r. 48.)

SCOPE.—This rule was newly added in the present Code. Under the old Code the salary of a public officer or a railway servant could not be attached when the disbursing officer was residing beyond the local limits of the jurisdiction of a Court executing the decree. 12 B. 44; 28 B. 198; 30 O. 713; 6 A. 243 F.B.; 14 C.W.N. 402; 11 C.P. L.R. 148; 3 C.L.R. 30. Under the present Code such salary may be attached whether the judgment-debtor or the disbursing officer is or is not within the local limits of the jurisdiction of the Court. Before the salary is in deposit in the office no prohibitory order can be issued for its attachment. 113 P.R. 1868. Where a Court did not attach the right to the allowance or salary but granted or issued an injunction to the disbursing officer to pay the amount in Court, the latter order does not amount to attachment. 5 I.O. 820=7 M.L.T. 110; 5 I.O. 145; 4 M. 983. Sub-rule (2) is not inconsistent with the provision to S. 64, O. P. Code. 14 Bcm. L.R. 633.

REMEDY AGAINST THE GOVERNMENT, ETC.—An order under this rule could not be made against Government, etc., before Government, etc., was on the

record and the rule merely gives the decree-holder a remedy against Government, etc., and leaves him to prosecute that remedy in due course. The Government is a necessary party to the application and to the appeal therefrom. 93 P.R. 1912; 10 P.R. 1910; 14 I.C. 737. When the auditor of a railway company who was the only disbursing officer was notified under O. 21, r. 48 as the officer to whom such notices should be sent and was prohibited by the order of a Court from paying to railway employees the amount of security deposit and where the auditor ignored the Court's order on the ground that the amount of security was not at his disposal and therefore was not liable to attachment, *held* that the deposit could be attached subject to the lien of the company, that the prohibitory order should not have been disregarded and that the company was liable to pay the amount. 24 I.C. 725=7 Bur. L.T. 238.

THE COURT.—Not only the Court that passed the decree, but also the Court to which a decree is transferred for execution can exercise the power of attachment given by this rule. 91 I.C. 1043.

NOTIFICATIONS.—For notifications see List F.

ATTACHMENT OF DECREES.—(1) Where the property to be attached is a decree, either for the payment of money or for sale in enforcement of a mortgage or charge, the attachment shall be made,—

(a) if the decree was passed by the same Court, then by the order of such Court; and

(b) if the decree sought to be attached was passed by another Court, then by the issue to such other Court of a notice by the Court which passed the decree sought to be executed, requesting such other Court to stay the execution of its decree unless and until—

(i) the Court which passed the decree sought to be executed cancels the notice, or

(ii) the holder of the decree sought to be executed or his judgment-debtor applies to the Court receiving such notice to execute its own decree.

(2) Where the property to be attached in the execution of a decree is a decree other than a decree of the nature referred to in sub-rule (1), the attachment shall be made by a notice, by the Court which passed the decree sought to be executed to the holder of the decree sought to be attached, prohibiting him from transferring or charging the same in

any way ; and, where such decree has been passed by any other Court, also by sending to such other Court a notice to abstain from executing the decree sought to be attached until such notice is cancelled by the Court from which it was sent. (O. 21, r. 53.)

SCOPE.—O. 21, r. 53 does not apply when the decree is not attached. When certain mortgage decrees were mortgaged and a mortgage decree was obtained on their basis, the decree-holder of such a decree can execute the mortgage decree if he be prohibited in execution. 1 I.O. 535=5 M.L.T. 278. This rule applies to attachment before judgment. 22 M.L.J. 394=14 I.C. 285. An order of stay under the rule does not prevent either the decree-holder of the decree sought to be executed or his judgment-debtor from seeking to execute the original decree and does not therefore interrupt the running of time against him under S. 15 of the Limitation Act. 48 B. 85.

DECREE.—A "decree" includes not only a Civil Court decree but also a Revenue Court decree. A Revenue Court decree should be attached in the same way as a Civil Court decree, otherwise it is an irregularity. 85 I.C. 660=1925 A. 264.

The certificate under O. 21, r. 71 as to the deficiency in purchase money is declared by that rule to be in effect a decree for the payment of money, for the purpose of its method of recovery. In the mode of attachment and sale also it may be considered as a decree for the payment of money. 1926 A. 379.

ATTACHMENT OF DECREE THAT IS SET ASIDE IN APPEAL.—Where a decree is attached which in appeal is reversed by a compromise between the parties, there is no subsisting decree capable of attachment and the attaching creditor has no remedy. He is himself to blame for having attached a decree for which there was a chance of being set aside. 22 P.L.R. 1905.

THE COURT ATTACHING A DECREE.—The Collector has no power to attach a decree. 9 W.R. 133 ; 12 W.R. 329 ; 14 O.W.N. 96 ; 10 O.L.J. 226.

ADDITIONAL RULE MADE BY THE MADRAS HIGH COURT.—O. 21, r. 53 (1) (b).—If the decree sought to be attached has been sent for execution to another Court, the Court which passed the decree shall send a copy of the said notice to the former Court, and thereupon the provisions of cl. (b) shall apply in the same manner as if the former Court had passed the decree and the said notice had been sent to it by the Court which issued it.

ATTACHMENT OF IMMOVEABLE PROPERTY.—(1) Where the property is immoveable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way and all persons from taking any benefit from such transfer or charge.

(2) The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be fixed on a conspicuous part of the property and then upon a conspicuous

part of the Court-house, and also, where the property is land paying revenue to the Government in the office of the Collector of the District in which the land is situate. (O. 21, r. 54.)

SCOPE.—The three conditions required for a valid attachment are.—(1) The written order must be read aloud at some place at or adjacent to the land. (2) It must be fixed at some conspicuous part of the property and then upon a conspicuous part of the court-house. 7 C. 466; 77 I.C. 879; 1923 L. 671; 48 I.O. 611; 5 M.L.J. 70. (3) It must be fixed up in the office of the Collector of the district in which the land is situate. 1 B.L.R. S.N. 20 (a) (not followed in 83 P.R. 1898 under old law in which case it was held that it was sufficient if the notice of the attachment was given by beat of drum on the spot and by affixing a notice on the house of the judgment-debtor situate on the spot). But see now 4 L. 211. The attachment of immoveable property is made in the manner provided by O. 21, r. 54. 21 B. 226. An attachment of a share of an undivided Hindu co-parcener in joint family property is effected by the attachment of his undivided share as a whole, and not of his undivided share in each item of it. 53 I.C. 336=10 L.W. 449. No notice is necessary to be served personally on the debtors in effecting an attachment under this rule. A.W.N. (1889) 192. The object of the proclamation is to give the judgment-debtor an opportunity of knowing that he is prohibited from alienating the property and the mere writing of an order of attachment behind his back and keeping it in the court records does not amount to an order of attachment under this rule. 42 M. 565; 39 I.C. 562; 39 I.C. 857; 32 I.C. 276; 34 I.C. 34; 26 I.C. 204. See 88 I.C. 321=1925 L. 583.

IMMOVEABLE PROPERTY.—The equity of the redemption of a mortgagor in the mortgaged property is immoveable property. 21 B. 226; 26 B. 305; 33 B. 311; 62 I.C. 167=33 C.L.J. 7. The life interest of a Parsi widow under her husband's will in the income of his immoveable property is immoveable property. 23 B. 1. Growing crops are not immoveable property. See S. 2 (13), C.P. Code; under the old Code they were immoveable property. 14 A. 30; 11 M. 193; 15 A. 94; 1 N.L.R. 121; 22 C. 877; 11 C.P.L.R. 89; 7 C.L.J. 152. The interest of a usufructuary mortgagee in the immoveable property is immoveable property. 35 B. 288; 19 B. 121; 19 P.R. 1909; 26 B. 305. A simple hypothecation bond is moveable property. 80 I.O. 890=22 A.L.J. 840; 12 C. 546; 20 C. 805; 6 C.W.N. 5; 19 B. 121; 18 M. 437; 37 M. 51; 16 I.C. 816; 28 I.C. 284=28 M.L.J. 338; 50 I.C. 157; 1 I.C. 450; 15 A. 134; 26 B. 305; 10 M.L.T. 503=(1911) 2 M.W.N. 690; (see also 9 M. 5; 10 M. 169; 18 M. 437; 16 I.C. 438; 35 B. 288 which are fluctuating decisions and hold to the contrary). A decree relating to immoveable property is not immoveable property. O. 21, r. 53 deals with the mode in which decrees are to be attached and dealt with in execution proceedings. They are a class by themselves whether a decree is one relating to moveable or immoveable property. There is nothing in the present Code to prevent a Small Cause Court from attaching and selling a decree for immoveable property. 16 N.L.R. 72=44 I.C. 252. O. 21, r. 54 does not apply to attachment of decrees whether they are money decrees or mortgage decrees. 10 B. 444; 1 I.C. 535. Such decrees are not immoveable property. 8 A.L.J. 1327; 64 I.C. 388; 6 C.W.N. 5; 16 N.L.R. 72 (contra in 1 A. 348). Superstructure of a house is immoveable property. 3 O.C. 236.

Paying Revenue.—Where a house stands on a site which is assessed to land-revenue, the property comes under the definition of land paying revenue to Government within the meaning of O. 21, r. 54. 88 I.C. 321=1925 L. 583.

PROCLAMATION OF THE ORDER OF ATTACHMENT.—In addition to the service of an injunction on the judgment-debtor prohibiting him from transferring or

charging the property in suit in any way. O. 21, r. 54 requires a proclamation of the order of attachment. Filing of process fee for the use of an order of attachment of immoveable property is no proof of the service of such order, it being a matter of common knowledge that such orders are very frequently returned unserved. The attachment is not valid till all the formalities are complied with and a private alienation of the property is not invalid unless it is proved that there was a valid attachment under O. 21, r. 54. 1 C.L.J. 549 = 26 I.C. 204; 39 I.C. 562; 36 M.L.J. 284; 42 M. 842 F.B.; (1918) Pat. 33; 34 I.C. 34; 18 I.C. 715. The proclamation under O. 21, r. 54 is not a formal proceeding, and must be made before the notices are posted in the Court-house under O. 21, r. 68. 11 O.L.R. 303; 7 C. 34. It is not necessary to serve a separate proclamation in each of the villages embraced in the same process. The word "property" refers to each plot. 12 C.W.N. 757.

DATE OF ATTACHMENT.--A valid attachment takes effect from the date of proclamation and the date of actual attachment and not from the date of the order of attachment. 42 M. 565; 42 M. 874 F.B.; 42 M. 152; 32 I.C. 276 (confirmed in 39 I. C. 857 on appeal). 39 I.C. 562; 34 I.C. 34; 26 I.C. 204.

ON SOME CONSPICUOUS PART OF THE PROPERTY.--Where the property was a right of fishing in a river 20 miles long, in such a case any particular spot on the river is not a conspicuous part of the property. The principle of the rule laid down in O. 21, r. 54 must be applied in such circumstances, and the copy of the order must be conspicuously displayed at various portions of the estate. In such a case the sale should be advertised in the local newspaper or in the Gazette. (1918) Pat. 33 = 44 I.C. 472. The same proclamation need not be served in each of the villages comprised in the property to be sold. 12 C.W.N. 758. The fixing up of a copy of notice on a conspicuous part of the property must precede the posting of the notice in the Court house. 7 C. 34.

DIVISION INTO LOTS OF PROPERTY TO BE SOLD.--A mere breaking up of an area into lots does not make it necessarily several properties for the purposes of a proclamation of attachment or sale. When estates though embraced in the same process are really at such a distance that there is no moral certainty of communication to persons on or interested in the one of what is publicly done on the other, there should be a separate proclamation on each in order that full intimation may be given of what is to be done. 12 B. 368.

ATTACHMENT OF THE PARTNERSHIP PROPERTY.—(1) Save as otherwise provided by this rule, property belonging to a partnership shall not be attached or sold in execution of a decree other than a decree passed against the firm or against the partners in the firm as such.

(2) The Court may, on the application of the holder of a decree against a partner, make an order charging the interest of such partner in the partnership property and profits with payment of the amount due under the decree and may, by the same or a subsequent order, appoint a receiver of the share of such partner in the profits (whether

already declared or accruing) and of any other money which may be coming to him in respect of the partnership and direct accounts and inquiries and make an order for the sale of such interest or other orders as might have been directed or made if a charge had been made in favour of the decree-holder by such partner, or as the circumstances of the case may require.

(3) The partner or partners shall be at liberty at any time to redeem the interest charged in the case of a sale being directed to purchase the same.

(4) Every application for an order under sub-rule (2) shall be served on the judgment-debtor and his partners or such of them as are within British India.

(5) Any application made by any partner of the judgment-debtor under sub-rule (3) shall be served on the decree-holder and on the judgment-debtor and on such of the other partners as do not join in the application and as are within British India.

(6) Service under sub-rule (4) or sub-rule (5) shall be deemed to be service on all the partners and all orders made on such applications shall be similarly served. (O. 21, r. 49.)

A decree against an individual partner can be made. Such a decree is contemplated in O. 21, r. 49. 23 C.W.N. 500 = 51 I.C. 597.

ADDITIONAL RULE MADE BY THE ALLAHABAD HIGH COURT.—O. 21, r. 105. Every attachment of moveable property under r. 43, of Negotiable Instruments under r. 51 and of immoveable property under r. 54 shall be made through a Civil Court Amin or Bailiff, unless special reasons render it necessary that any other agency should be employed; in which case those reasons should be stated in the handwriting of the presiding judge himself in the order for attachment.

III. A.—CUSTODY OF MOVEABLE PROPERTY, AND SAPURDDAR OR CUSTODIAN.

The attaching officer shall keep the property in his own custody or in the custody of one of his subordinates and shall be responsible for the due custody thereof. (See O. 21, r. 43.)

RULES MADE UNDER THE OLD CODE.—Rules made by the Local Government under S. 269 of the old Code of 1882 for the maintenance of the live-stock continue in force, though they are inconsistent with the provisions of O. 21, r. 43. 37 M. 17.

ADDITIONAL RULES MADE BY THE MADRAS HIGH COURT.—For O. 21, r. 43 substitute the following rules, viz.:—43 (1) Where the property to be attached is moveable property, other than agricultural produce in the possession of the judgment-debtor, the attachment shall be made by actual seizure, and the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof.

Provided that when the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once, and

Provided also that, when the property attached consists of live-stock, agricultural implements or other articles which cannot conveniently be removed and the attaching officer does not act under the first proviso to this rule, he may at the instance of the judgment-debtor or of the decree-holder or of any person claiming to be interested in such property leave it in the village or place where it has been attached.—(a) in the charge of the person at whose instance the property is retained in such village or place, if such person enters into a bond, in the Form No. 15-A of Appendix E to this schedule with one or more sufficient sureties for its production when called for, or (b) in the charge of an officer of the Court, if a suitable place for its safe custody be provided, and the remuneration of the officer for a period of 15 days at such rate as may from time to time be fixed by the High Court be paid in advance.

(2) Whenever an attachment made under the provisions of this rule ceases for any of the reasons specified in r. 55 or r. 57 or r. 60 of this order, the Court may order the restitution of the attached property to the person in whose possession it was before attachment.

43 (A).—(1) Whenever attached property is kept in the village or place where it is attached, the attaching officer shall forthwith report the fact to the Court and shall with his report forward a list of the property seized. (2) If attached property is not sold under the first proviso to r. 43 or retain in the village or place where it is attached under the second proviso to that rule, it shall be brought to the Court-house and delivered to the proper officer of the Court.

43 (B).—(1) Whenever attached property kept in the village or place where it is attached is live-stock, the person at whose instance it is so retained shall provide for its maintenance, and if he fails to do so, and if it is in charge of an officer of the Court, it shall be removed to the Court-house. Nothing in this rule shall prevent the judgment-debtor, or any person claiming to be interested in such stock from making such arrangements for feeding the same as may not be inconsistent with its safe custody.

(2) The Court may direct that any sums which have been expended by the attaching officer or are payable to him, if not duly deposited or paid, be recovered from the proceeds of property, if sold, or be paid by the person declared entitled to delivery before he receives the same. The Court may also order that any sums deposited or paid under these rules be recovered as costs of the attachment from any party to the proceedings.

ADDITIONAL RULES MADE BY THE RANGOON HIGH COURT.—O. 21, r. 45-A.—(1) Before issuing a warrant, for the attachment of moveable property which it will be necessary to place in charge of one or more persons, permanent or temporary,

the court shall satisfy itself that the attaching decree-holder has produced a receipt in form 15-A, Appendix E, from the Bailiff that he has paid in cash as process-fees under r. 17 (1) (c) ii (2) of the Process Fees Rules not less than Rs. 10 for each person who the Bailiff considers should be employed.

(2) In sending the warrant for execution to the Bailiff the Court clerk shall certify at the foot of the warrant that the receipt granted by the Bailiff for the necessary fees has been filed in the record, the Bailiff shall then endorse on the warrant the name of the process-server to whom it is issued for execution. If a temporary peon is employed for the custody of the attached property the process-server shall state in his report of the attachment, the name of temporary peon employed and the date from which his duties commenced.

(3) At the time of granting the receipt in Form 15-A for payments made by the decree-holder, as required by sub-rule (1) the Bailiff shall state in the lower portion of the form the date on which the fees paid will be exhausted, warning the decree-holder that the property will not be kept under attachment after that date, unless further fees are paid before that date.

If the further fees required are not paid, the attachment shall cease as soon as the period for which fees have already been paid expires. In such a case the amount paid prior to the cessation of the attachment shall not be allowed to the attaching decree-holder as costs.

(4) The payment of fees under sub-r. (1) shall be made in cash to the Bailiff, and the amount shall be at once entered in Bailiff's Register No. II. The Court clerk, shall on receipt of the Bailiff's acknowledgement (Form 15-A) file it in the record and make an entry to that effect in the diary.

(5) Temporary peons employed for the custody of attached property shall be remunerated at the rate provided for in r. 15 of the rules regarding process serving establishments, provided that the total remunerations disbursed shall in case exceed the amount of the process fees actually paid under the foregoing sub-rules.

Permanent peons shall be presumed to be remunerated at the same rate as temporary peons, but if the services of the former are utilised, the fees paid shall be credited direct into the Treasury to "Process-Servers fees"—XVI-A, "Law and Justice"—"Courts of Law"—"Court Fees realised in Cash".

(6) The remuneration of temporary peons employed to take charge of attached property shall be paid direct by the Bailiff to them on the order of the Judge.

Before passing such order, the Judge must verify the name of the payee from the report of the attachment and must satisfy himself that the amount proposed to be paid does not exceed the amount of fees deposited with the Bailiff, or if payments have already been made in the case, of the unexpired balance of such deposits, and that all amounts previously drawn have been disbursed to the proper persons.

(7) When the order has been signed by the Judge the money shall be disbursed by the Bailiff at once to the peon or peons concerned, whose acknowledgment of receipt shall be taken in Bailiff's Register No. II. If, however, the amount has been transferred to Bailiff's Register No. I, the Bailiff shall draw the amount necessary for payment from the Treasury as if it were a repayment of deposit and shall then disburse the amount due to the peon or peons concerned, whose acknowledgment of receipt shall be taken in Bailiff's Register I.

(8) When the attachment is brought to a close or has not been effected, if the Judge finds, at the time of calculating the amount paid in and properly chargeable

for peons, that the total amount of fees actually paid under sub-rr.(1) and (3) exceeds the total amount that is chargeable for peons, including the amount of the last payments, he shall direct that the excess be refunded to the payer.

(9) The Judge shall in all cases in which a refund is to be made, issue to the Bailiff an order, a copy of which shall be placed on the record, to make such refund.

If a sufficient portion of amount paid by the decree-holder to pay such refund is in the hands of the Bailiff that officer shall make the refund in the ordinary way, prescribed in Register No. II for repayments. If the amount has been credited into the Treasury, he shall prepare a bill for the amount to be refunded in the prescribed Treasury form and shall lay it before the Judge for signature with the record of the case in the same way as a bill for the remuneration of temporary peons. Before signing the refund order, the judge must satisfy himself that the amount is available for refund by examining Bailiff's Register No. I and the record. The bill when signed by the Judge will be given to the payee, with instructions to present it for payment at the Treasury or Sub-Treasury.

O. 21, r. 45-B.—(1) In addition to the fees payable before a warrant issues for the attachment of moveable property under r. 45 (A) the Bailiff shall require the attaching decree-holder to deposit a sum of money sufficient to cover the cost of attachment other than the pay of peons employed to take charge of it, for such period as the Bailiff may think fit.

Explanation.—The costs in question might be for example,

(a) rent of building in which to store attached furniture, (b) cost of conveying the attached property from the place of attachment to court or to a secure place of custody, (c) cost of feeding and tending live-stock, (d) cost of proceeding to the place of attachment to sell perishable property.

(2) If the attaching decree-holder fails to comply with the Bailiff's requisition, the warrant shall not be issued.

(3) Sums thus deposited shall be entered in the Bailiff's Register Nos. I and II and any repayments thereof shall be made according to existing orders. A receipt for such sums shall be granted to the Bailiff in Form 15-A, Appendix E.

(4) In the receipt given for the sums deposited, the Bailiff shall state the period for which such sums will last, and if the attaching decree-holder does not deposit a further sum before the expiry of such period, the attachment shall cease when the sum deposited is exhausted.

(5) The officer actually attaching the property shall, unless the Court otherwise directs, give the debtor, or in his absence, any adult member of his family who may be present, the option of having the attached property kept on his premises or elsewhere on condition that a suitable place for its safe custody is duly provided. The option so given may be subsequently withdrawn by order of the court.

Where the attached property consists of cattle, these may be employed, so far as is consistent with r. 43 in agricultural operations.

(6) If no such suitable place be provided, or if the Court directs that the property shall be removed, the officer shall remove the property to the Court, unless the property attached is a growing crop when r. 45 applies. Whenever live-stock is placed at the place where it has been attached the judgment-debtor shall be at liberty to undertake the due feeding and tending of it under the supervision of the attaching officer.

(7) Whenever property is attached, the officer shall forthwith report to the Court and shall with his report forward an accurate list of the property seized.

(8) If the debtor shall give his consent in writing to the sale of property without awaiting the expiry of the term prescribed in r. 68, the officer shall receive the written consent and forward it without delay to the court for its orders.

(9) When property is removed to the Court, it shall be kept by the Bailiff, on his own sole responsibility, in such place, as may be approved by the Court. If the property cannot, from its nature or bulk, be conveniently kept on the court premises, or in the personal custody of the Bailiff, he may subject to the approval of the Court make such arrangement for its safe custody under his own supervision as may be most convenient and economical.

(10) If there be a Government pound in or near the place where the Court is held, the Bailiff shall be at liberty to place in it such attached live-stock as can be properly there kept, in which case the pound-keeper will be responsible for the property to the Bailiff, and shall receive the same rates for accommodation and maintenance thereof as are paid in respect of impounded cattle of the same description.

(11) Whenever property is attached and any person other than the judgment-debtor shall claim the same, or any part of it, the officer shall nevertheless, unless the decree-holder desires to withdraw the attachment of the property so claimed, remain in possession, and shall direct the claimant to prefer his claim to the Court.

(12) If the decree-holder shall withdraw an attachment or if it shall cease under sub-r. (2) or (4), the Bailiff's officer shall inform the debtor, or in his absence an adult member of his family that the property is at his disposal.

(13) If any portion of the deposit made under sub-r. (1) or (4) remains unexpended, it shall be refunded to the decree-holder in the manner prescribed for such refunds in sub-r. (9) of r. 45. A. Any difference between the cost of attachment of moveable property (other than the cost referred to in r. 45-A) and the sums deposited by the attaching decree-holder shall, unless the difference is due to the fault of the Bailiff, be recovered from the sale proceeds of the attached property, if any, and, if there are no sale proceeds, from the attaching decree-holder on the application of the Bailiff. If there is still a deficiency the amount shall be paid by Government.

ADDITIONAL RULES MADE BY THE ALLAHABAD HIGH COURT.—O. 21, r. 117.—Live-stock which has been attached in execution of a decree shall ordinarily be left at the place where the attachment is made either in custody of the judgment-debtor on his furnishing security or in that of some land-holder or other respectable person willing to undertake the responsibility of its custody and to produce it when required by the Court.

O. 21, r. 118.—If the custody of live-stock cannot be provided for in the manner described in the last preceding rule, the animals attached shall be removed to the nearest pound established under the Cattle Trespass Act, 1871, and committed to the custody of the pound-keeper, who shall enter in a register—

- (a) the number and description of the animals ;
- (b) the day and hour on and at which they were committed to his custody ;
- (c) the name of the attaching officer or his subordinate by whom they were committed to his custody ; and shall give such attaching officer or subordinate a copy of the entry.

O. 21, r. 119.—For every animal committed to the custody of the pound-keeper as aforesaid, a charge shall be levied as rent for the use of the pound for each fifteen or part of fifteen days during which such custody continues, according to the scale prescribed under S. 12 of Act I of 1871.

And the sum so levied shall be sent to the Treasury for credit to the Municipal or District Board, as the case may be, under whose jurisdiction the pound is. All such sums shall be applied in the same manner as fines levied under S. 12 of the said Cattle Trespass Act.

O. 21, r. 120.—The pound-keeper shall take charge of, feed and water animals attached and committed as aforesaid until they are withdrawn from his custody as herein after provided and he shall be entitled to be paid for their maintenance at such rates as may be, from time to time prescribed, under proper authority. Such rates shall, for animals specified in the section mentioned in the last preceding rule not exceed the rates for the time being fixed under S. 5 of the same Act. In any case for special reasons to be recorded in writing, the Court may require payment to be made for maintenance at higher rates than those prescribed.

O. 21, r. 121.—The charges herein authorised for the maintenance of live-stock shall be paid to the pound-keeper by the attaching officer for the first fifteen days at the time the animals are committed to his custody, and thereafter, for such further period as the Court may direct at the commencement of such period. Payments for such maintenance so made in excess of the sum due for the number of days during which the animals may be in the custody of the pound-keeper shall be refunded by him to the attaching officer.

O. 21, r. 122.—Animals attached and committed as aforesaid shall not be released from custody by pound-keeper except on the written order of the Court, or of the attaching officer, or of the officer appointed to conduct the sale; the person receiving the animals, on their being so released shall sign a receipt for them in the register mentioned in r. 118.

O. 21, r. 123.—For the safe custody of moveable property other than live-stock while under attachment, the attaching officer shall subject to approval by the Court, make such arrangements as may be most convenient and economical.

O. 21, r. 124.—With the permission of the Court the attaching officer may place one or more persons in special charge of such property.

Permission.—The permission to be obtained ought to be obtained at the proper time before or immediately after the custodian is appointed. A general permission to appoint a custodian is not enough. Where he acts without permission and appoints a custodian, he and not the custodian is liable to imburse the party whose property is attached. 1926 A. 406.

O. 21, r. 125.—The fee for the services of each such person shall be payable in the manner prescribed in r. 116. It shall not be less than four annas and shall ordinarily not be more than six annas per diem. The Court may at its discretion, allow a higher fee; but if it do so, it shall state in writing its reasons for allowing an exceptional rate.

O. 21, r. 126.—When the services of such person are no longer required the attaching officer shall give him a certificate on a counterfoil form of the number of days he has served and of the amount due to him, and on the presentation of such certificate to the Court which ordered the attachment, the amount shall be paid to him in the presence of the presiding Judge:

Provided that where the amount does not exceed Rs. 5, it may be paid to the *sahna* by money order on requisition by the *Amīn*, and the presentation of the certificate may be dispensed with.

O. 21, r. 127.—When in consequence of an order of attachment being withdrawn, or for some other reason the person has not been employed or has remained in charge of the property for a shorter time than that for which payment has been made in respect of his services, the fee paid shall be refunded in whole or in part, as the case may be.

O. 21, r. 128.—Fees paid into Court under the foregoing rules shall be entered in the Register of petty Receipts and Repayments.

O. 21, r. 129.—When any sum levied under r. 119 is remitted to the Treasury, it shall be accompanied by an order in triplicate (in the form given as form No. 9 of the Municipal Account Code) of which one part will be forwarded by the Treasury Official to the District or Municipal Board, as the case may be. A note that the same has been paid into the Treasury as rent for the use of the pound will be recorded on the extract from the pass-book.

LIABILITY OF SAPURDDAR OR CUSTODIAN OF PROPERTY.—The Sapurdar of attached property is responsible to the Court for its production and if he refuse to produce it when called upon to do so, he is liable to pay its value. 60 P.R. 1919. The executing Court has power to order the sapurdar to produce the property for sale if necessary, or to return it to the judgment-debtor, or to the objector or any other person from whose possession it was taken or attached, upon the decree being satisfied, or objection being allowed or upon the termination of any proceeding in execution or for any cause whatever. 20 N.L.R. 95=80 I.C. 49. Where the custodian is appointed by the attaching officer without the permission of the Court under O. 21, r. 124 (Allahabad High Court Rules) the custodian is not responsible to the Court. It is the attaching officer who is responsible in such a case. 1926 A. 406. Under O. 21, r. 43 the attaching officer is bound to keep the property in his own custody, and is held to be responsible for the due custody thereof. He is responsible as much to the Court of appeal as to the trial Court, and the former Court has authority to pass any order it may think fit against him under the circumstances. 1926 A. 406.

When the property is released from attachment.—Although the attachment of property comes to an end on the dismissal of execution proceedings for default, the depository or custodian of the attached property is responsible to produce the same. 60 P.R. 1919.

ENFORCEMENT OF THE LIABILITY OF THE SAPURDDAR.—In execution Proceedings.—An executing Court has power to order the Sapurdar to produce the property and visit him with any penalty for his default in obeying its orders by proceeding against him in a summary manner in order to prevent the abuse of process and for shortening litigation or for the ends of justice. 20 N.L.R. 93=80 I.C. 49.

By a separate suit.—The liability of a depository for the safe custody of livestock which has been attached cannot be determined in execution proceedings. 13 C.P. L.R. 104.

For other cases, see Chapter IX.

ENFORCEMENT OF THE LIABILITY OF THE SURETY OF THE SAPURDDAR.—When the sapurdar executes a bond with sureties for the safe custody and production in court of the property made over to him, the decree-holder cannot enforce the bond against the sureties in execution proceedings on failure of the production of property. He may get the bond assigned to him by the Judge of the Court and sue upon it. 60 I.C. 131=(1920) M.W.N. 784; 47 I.C. 956=16 N.L.R. 178; 13 C.P. L.R. 104, 15 C. 497; 22 C. 25; 17 A. 99; 13 M. 1; 13 B. 411; 19 A. 247. (*Contra* held in 19 A.L.J. 217, that the surety can be proceeded against in execution on the failure of the Sapurdar to produce the property.

DISAPPEARANCE OF PROPERTY IN THE HANDS OF THE CUSTODIAN AND THE LIABILITY OF THE JUDGMENT-DEBTOR.—If moveable property is attached and made over to a sapurdar or custodian under rules made under O. 21, r. 43 and the property is not forthcoming from the custodian who is himself missing, the

decree-holder is not entitled to proceed against other property of the judgment-debtor unless it is shown that the judgment-debtor was a party to the disappearance of the property attached. 21 P.R. 1899.

IV.—HOW TO FIND OUT THE ATTACHABLE ESTATE OF THE JUDGMENT-DEBTOR.

EXAMINATION OF JUDGMENT-DEBTOR, ETC.—Where a decree is for the payment of money, the decree-holder may apply to the Court for an order that—

- (a) the judgment-debtor, or
- (b) in the case of a corporation, any officer thereof,
or
- (c) any other person,

be orally examined as to whether any or what debts are owing to the judgment-debtor, and whether the judgment-debtor has any and what other property or means of satisfying the decree; and the Court may make an order for the attendance and examination of such judgment-debtor or officer or other person and for the production of any books or documents. (O. 21, r. 41.)

SCOPE.—This rule applies to an order obtained from a Judge in Chambers by an attorney against his client for the payment of costs. 17 B. 514. This rule applies to all the property of the judgment-debtor out of which the decree can be satisfied either by delivery in obedience to the decree or by sale. 17 B. 514; 10 M.L.A. 563.

OBJECT OF THE RULE.—The object of O. 21, r. 41 is to obtain discovery for purposes of execution to avoid unnecessary trouble in obtaining satisfaction of money decrees. Although an order for personal examination is likely to operate harshly and cause unnecessary harassment and ought not to be made unless the Court is satisfied about the *bona fides* of the application and its urgent necessity, still such applications may be usefully encouraged to prevent unduly dilatory troublesome and expensive execution proceedings. 43 C. 285.

TIME FOR MAKING ENQUIRY.—The enquiry may be made at any time and not particularly at a time before the issue of process. 17 B. 514.

IV A.—TIME FOR TAKING OBJECTION TO ATTACHMENT.

When an application is made for attachment before judgment, the defendant is not at the time obliged to take exception to the validity of the attachment on the ground that the property is not transferable. If he takes that objection after the decree is passed the investigation of the question is not barred for the reason that he omitted to take it before. 38 C. 448. When there is no suppression of notices the judgment-debtor is bound to object to the attachment at the earliest possible opportunity and when he does not do so he cannot be heard after the sale has taken place. 1 Pat. L.T. 267=56 I.C. 646. A judgment-debtor who might have laid objection to a sale in execution of a decree against

him but who has refrained from doing so and who might have appealed against the order for sale has no right after the sale has been carried out to prefer an objection that the property sold was not legally saleable. 29 A. 612 ; 7 A. 641 ; 26 C. 727. When a Court has no jurisdiction to sell a property it is immaterial whether a decree for sale of that property has been previously obtained and is in execution. A decree declaring under O. 21, r. 63 that land was not liable to be sold in execution did not stop the judgment-debtor from raising objection that it was not saleable. 46 A. 153.

Time for taking objection by a stranger.—When a vendee before attachment prefers an objection to say and then withdraws it, and then the property is sold he is not barred from bringing a suit for possession against the judgment-debtor and the auction-purchaser. 7 M.H.C. 359.

V.—PROCEDURE IN EFFECTING ATTACHMENT.

PROCESS FOR EXECUTION.—(1) Where the preliminary measures (if any) required by the foregoing rules have been taken, the Court shall issue, unless it sees cause to the contrary, its process for the execution of the decree. (2) Every such process shall bear date the day on which it was issued and shall be signed by the Judge or such officer as the Court may appoint in this behalf, and shall be sealed with the seal of the Court and delivered to the proper officer to be executed. (3) In every such process a day shall be specified on or before which it shall be executed. (O. 21, r. 24.)

ENDORSEMENT ON PROCESS.—(1) The officer entrusted with the execution of the process shall endorse thereon the day on, and the manner in, which it was executed and if the latest day specified in the process for the return thereof has been exceeded, the reason of the delay, or if it was not executed, the reason why it was not executed, and shall return the process with such endorsement to the Court. (2) Where the endorsement is to the effect that such officer is unable to execute the process the Court shall examine him touching his alleged inability, and may, if it thinks fit summon and examine witnesses as to such inability and shall record the result, (O. 21, r. 25).

ADDITIONAL RULE MADE BY THE ALLAHABAD HIGH COURT.—O. 21, r. 25 (2).—Where the endorsement is to the effect that such officer is unable to execute the process, the Court may examine him personally or upon affidavit touching his alleged inability and may, if it thinks fit summon and examine witnesses as to such inability, and shall record the result.

ADDITIONAL RULE MADE BY THE MADRAS HIGH COURT.—In O. 21, r. 25 (2) insert the words "or cause him to be examined by any other Court" after the words "examine him." Add the following proviso to r. 25 (2):—"Provided that an examination of the officer entrusted with the execution of a process by the Nazir or the Deputy Nazir under the general or special orders of the Court shall be deemed to be sufficient compliance with requirements of this clause."

Notice of attachment must contain a sufficient description of the property to be attached in order to identify it. 18 W.R. 411.

DISCRETION OF THE COURT TO REFUSE EXECUTION.—The Court cannot *suo moto* refuse attachment of the property on an application by the decree-holder for attachment of certain property as belonging to the judgment-debtor on the ground that it does not belong to the judgment-debtor. The proper procedure is to

allow such attachment and in case an objection be filed by a claimant under O. 21, r. 58, to decide it in accordance with law. 18 P.W.R. 1907. When a decree-holder moves the Court in accordance with law to attach the property of his judgment-debtor the Court is bound to issue process for attachment and cannot refuse to do so. 57 P.R. 1897. It is not open to the Court to refuse to execute a decree. 10 C. 817. A Court cannot refuse to attach property on the informal letter from the Official Assignee. 57 P.R. 1897. A Court cannot refuse execution merely on the ground that the previous application for execution has proved infructuous. 17 W.R. 165.

SHALL BE SIGNED AND SEALED.—The warrant of arrest may be signed by the Judge himself or by any other officer appointed in that behalf by the Court. 6 C. W.N. 845. The initials of the Munsarim of the Court is sufficient signature. 8 A. 293. A Munsarim or sheristadar has no authority to sign such warrant unless he has been actually appointed to do so by the Court. A.W.N. (1887) 42; 18 A.L.J. 284; (49 I.C. 171=20 Cr. L.J. 139, the onus of proving the absence of authority lies on the party contesting it). The warrant must be sealed with the seal of the Court. 49 I.C. 171=20 Cr. L.J. 139.

DELEGATION OF AUTHORITY TO EXECUTE.—A Nazir is not debarred from authorising a deputy to execute it for him and the endorsement of the deputy's name on the back of the warrant is sufficient *prima facie* evidence of the delegation. 6 A. 385; 22 C. 596; 22 C. 759. A Nazir of a Court has no authority to execute a warrant addressed to the Bailiff of the Court. 36 I.C. 871=18 Cr. L.J. 39. The officer entrusted with the execution mentioned in r. 25 is the peon and the Nazir. 40 C. 849.

PROOF OF EXECUTION OF WARRANT.—The Court ought not to decide merely on the report of the Court officials and to disallow the production of evidence by the judgment-debtor. 7 C. 34. The Nazir's return of warrant is no legal evidence of the service of the process. 3 W.R. Mis. 11; 4 W.R. Mis. 4; 6 W.R. Act X Rul. 92; 10 W.R. 3; 18 W.R. 197; (*contra* was held in 12 W.R. 365).

SEIZURE OF PROPERTY IN DWELLING-HOUSE.—(1) No person executing any process under this Code directing or authorising seizure of moveable property shall enter any dwelling-house after sunset and before sunrise.

(2) No outer door of a dwelling-house shall be broken open unless such dwelling-house is in the occupancy of the judgment-debtor and he refuses, or in any way prevents access thereto, but when the person executing any such process has duly gained access to any dwelling-house, he may break open the door of any room in which he has reason to believe any such property to be.

(3) When a room in a dwelling-house is in the actual occupancy of a woman who according to the customs of the country does not appear in public, the person executing

the process shall give notice to such woman that she is at liberty to withdraw and after allowing reasonable time for her to withdraw and giving her reasonable facility for withdrawing, he may enter such room for the purpose of seizing the property, using at the same time precaution consistent with these provisions to prevent its clandestine removal. (S. 62.)

BREAKING OPEN OUTER DOOR.—When in execution of a decree, moveable property has to be attached, the Court officer is at liberty to break open the outer door of the house of the person against whose property the attachment is issued. 72 P.R. 1876. A bailiff or Nazir can break open the door of a shop in obedience to a process for effecting attachment. 3 B. 80; or any other building at a distance from the dwelling house and not forming a part of it. 8 B.H.C. A.C. 127. After gaining access to a house the attaching officer has a right to unlock the door of a room which he suspects to contain moveable property. 5 M.H.C. 189.

VI.—CONTINUANCE OF ATTACHMENT.

AN ATTACHMENT OF PROPERTY CONTINUES UNLESS AND UNTIL IT IS PUT AN END TO.—Where an estate yielding periodical payments is attached, it is not necessary to file a fresh application for attachment of each payment. The attachment continues. 2 B. 294. An attachment cannot cease merely because the land attached is transferred from the jurisdiction of the Court which attached it to that of another Court or because the Court to which the decree is sent for execution certifies that it is unable to execute it. 12 M.L.J. 24.

REMOVAL OF ATTACHMENT AFTER SATISFACTION OF DECREE.—Where, (a) the amount decreed with costs and all charges and expenses resulting from the attachment of any property are paid into Court; or (b) satisfaction of the decree is otherwise made through the Court or certified to the Court; or (c) the decree is set aside or reversed, the attachment shall be deemed to be withdrawn, and in the case of moveable property, the withdrawal shall, if the judgment-debtor so desires be proclaimed at his expense, and a copy of the proclamation shall be affixed (in the manner prescribed in rule 54) on a conspicuous part of the Court-house and also where the property is land paying revenue to the Government, in the office of the Collector of the district in which the land is situate. (O. 21, r. 55.)

SCOPE.—No order of the court is necessary for the withdrawal of attachment under the present Code and it "shall be deemed to be withdrawn". Under the old Code an order was necessary for the purpose. An attachment of property cannot be deemed

to be withdrawn when satisfaction of the decree in part only is certified to the Court. 10 A.L.J. 165—15 I.O. 677.

Cl. (a).—The mere tender of money before the Judge is not sufficient to enable the judgment-debtor to have the sale of his property stayed. 2 Hay, 302. When a judgment-debtor deposited money in Court and the receipt having been filed in the regular record and not execution record the court overlooked the fact and the sale was effected, the Court afterwards cancelled the sale on the required information and ordered the judgment-debtor as entitled to a refund of the decretal amount plus 5 per cent. 9 I.O. 472—4 Bur. L.T. 28.

Cl. (c).—When a decree is set aside and a new trial granted, the attachment falls to the ground. 10 W.R. 99; 7 C.L.R. 424; 9 C.P.L.R. 120; 12 W.R. 16 F.B.; 4 B.L.R. O.O. 92; 11 P.R. 1871. An attachment ceases when the suit is dismissed. 14 W.R. 101.

TIME WHEN THE ATTACHMENT CEASES.—The attachment ceases under this rule from the moment the money is paid into Court or when the satisfaction is entered. 28 M. 380; 81 P.R. 1908.

EFFECT OF REMOVAL OF ATTACHMENT.—When the attachment is removed, an assignee has a good title against persons claiming under the attachment. 15 C. 771; 7 A. 702; 16 B. 91; 8 C. 279; 19 A. 482.

ADDITIONAL RULE MADE BY THE ALLAHABAD HIGH COURT.—O. 21, r. 55 (1)—Notice shall be sent to the sale officer executing a decree of all applications for rateable distribution of assets made under S. 73 (1) in respect of the property of the same judgment-debtor by persons other than the holder of the decree for the execution of which the original order was passed.

(2) Where—(a) the amount decreed [which shall include the amount of any decree passed against the same judgment-debtor, notice of which has been sent to the sale officer under sub-S. (1),] with costs and all charges and expenses resulting from the attachment of any property are paid into Court, or (b) satisfaction of the decree [including any decree passed against the same judgment-debtor, notice of which had been sent to the sale officer under sub-section (1)] is otherwise made through the Court or certified to the Court, or (c) the decree [including any decree passed against the same judgment-debtor notice of which has been sent to the sale officer under sub-section (1)] is set aside or reversed, the attachment shall be deemed to be withdrawn, and in the case of immoveable property, the withdrawal shall, if the judgment-debtor so desires, be proclaimed at his expense, and a copy of the proclamation shall be affixed in the manner prescribed by the last preceding rule.

DETERMINATION OF ATTACHMENT.—Where any property has been attached in execution of a decree, but by reason of the decree-holder's default, the Court is unable to proceed further with the application for execution, it shall either dismiss the application, or for any sufficient reason adjourn the proceedings to a future date. Upon the dismissal of such application the attachment shall cease. (O. 21, r. 57.)

OBJECT.—The object of the rule is to prevent the continuance of the attachment for an indefinite period. 28 I.O. 62; 154 P.R. 1919.

SCOPE.—Where there is an explicit order putting an end to the attachment, the provisions of this rule have no application, nor is there anything in the rule which limits the power of the court to pass such an order. 66 I.O. 642.

Dismissal of application for execution.—Under O. 21, r. 57 the attachment shall cease only if the application for execution has been dismissed for any default of the decree-holder. In all other cases of dismissal it is a question of fact in each case whether the order removing the application from the file does or does not prevent the attachment from subsisting. 3 L.W. 601=35 I.O. 240; 44 I.O. 566; 43 I.O. 155; 15 I.O. 406; 46 B. 942. Dismissal of execution proceedings for no default of the decree-holder does not terminate attachment. 48 I.O. 786=(1918) Pat. 353. Mere dismissal of an execution petition does not cause the attachment before judgment to cease. 16 C.L.J. 186=14 I.O. 345; 80 I.O. 106=22 A.L.J. 823; 42 M. 1; 26 I.O. 81; 22 I.O. 351. As the rule does not apply to attachment before judgment, there being no application for execution (*ibid*) (*contra* held in 47 M. 483 F.B. also 66 I.O. 850). If the Court adjourns proceedings to a further date or stays execution, the attachment remains in continuance. 3 L.W. 601=35 I.O. 240. Under the old law there was no provision like that provided in O. 21, r. 57; and there was much conflict of opinion about the point where execution proceedings had been struck off or removed from the file and consequently it was doubtful whether the attachment ceased or not. Such cases are not likely to arise now if O. 21, r. 57 is strictly followed. 29 C.L.J. 411=51 I.O. 972; 10 I.O. 242. The dismissal of an application under O. 21, r. 57, has the effect of vacating a prior order passed under O. 21, r. 23, ordering execution to proceed. 2 L.W. 1055=31 I.O. 293; 42 M. 1; 1 L.W. 665. Where an execution proceeding is dismissed for default, the attachment previously effected does not continue in operation. 20 I.O. 149=19 C.L.J. 248; 75 I.O. 824; 38 I.O. 300=5 L.W. 204. O. 21, r. 57 applies only to orders of dismissal of execution applications passed after the new Code came into force. An attachment in pursuance of an execution application which was subsisting in 1908 does not cease by the mere dismissal of the application after the new Code came into force. 27 I.O. 568; 27 I.O. 792. O. 21, r. 57 does not apply when there is no default of the decree-holder and where there has been no order dismissing for default. 34 A. 490. The new O. P. Code provides expressly for dismissing an execution application if the decree-holder does not take some further step until that step is taken the application must be considered to be pending. 39 M. 570; 55 I.O. 526=11 L.W. 42. Where the Court struck off the application for execution without dismissing the application or adjourning the proceedings, the attachment was held not to be pending and continuing to subsist. 154 P.R. 1919; 23 O.C. 166=57 I.O. 509; 38 I.O. 300. The order of release of property from attachment involves the dismissal of the application. 154 P.R. 1919. Though an order dismissing an application for execution but maintaining an attachment is not a proper order to pass for the court, but once it is passed it is binding on the parties between whom it is passed. 44 A. 274. Strictly speaking, when the application is struck off the attachment would go with it. 1923 Bom. 30; 4 Pat. L.T. 418=71 I.O. 881. The operation of the rule must be confined within the smallest possible limits. 28 I.O. 62=(1915) M.W.N. 159. A mistaken impression on the part of the decree-holder that the attachment still be subsisted in force notwithstanding the dismissal of the application for execution does not nullify the effect of the imperative provisions of this rule. 1 L.W. 665. The dismissal of the execution application for default of prosecution does not put an end to the attachment which may continue in full force thereafter. 51 I.O. 972; 8 I. C. 727; 11 C.W.N. 163; 14 B.L.R. 425; 87 I.O. 695=48 M.L.J. 616; 44 I.O. 566; 43 I.O. 155; 15 I.O. 406=(1912) M.W.N. 407.

DEFAULT OF THE DECREE-HOLDER.—The word default used in the rule is not restricted to default of the appearance or matters of that description. It means

a failure to do what the decree-holder was bound to do, that is, to go on with the application and have the property sold. 3 L. 7. When the decree-holder admitted that certain property had been sold by mistake, and agreed to make a fresh application for execution, there was default on the part of the decree-holder within the meaning of the rule. 41 M. 157 ; 38 O. 482 ; 15 C.W.N. 428 ; 75 I.O. 824 ; 75 I.O. 491=1923 M. 702. Omission to issue notice under O. 21, r. 66 is a default. 15 C.W.N. 428. Where, after a claim to certain jewels by the brother of the judgment-debtor had been dismissed, the decree-holder applied for proclamation and sale, without a prayer for production as he ought to have done and where the District Munsiff ordered notice to the brother to produce them and the petition was dismissed owing to non-payment of batta it was held that the attachment did not terminate with the dismissal of the petition. (1915) M.W.N. 159=28 I.O. 62. When the parties have notice to appear on a certain date for the hearing and determination of the execution proceedings and on account of their non-appearance, the execution is struck off, there is complete termination of the case with the result that under such circumstances the attachment is removed. 19 C.L.J. 248=20 I.O. 149. The default of the decree-holder contemplated by O. 21, r. 57, as a ground of dismissal of an application must be default in the discharge of some obligation laid on him by the Code or the rules framed under it. The omission of the decree-holder to attend the sale and his failure to bid at the sale do not constitute such default and when an application is dismissed on that ground it does not terminate the attachment. Therefore when under a mistaken impression that an attachment of property has ceased by reason of dismissal of a prior application for execution the decree-holder put in a fresh application and the court ordered him to pay batta and file a schedule of the immoveable properties required to be attached and owing to his default in furnishing the said schedule, the *ex parte* application was dismissed, held that the dismissal of the execution was not one under O. 21, r. 57 and that the attachment already subsisting on the property did not cease. 75 I.O. 491=45 M.L.J. 915 ; 3 Pat. L.J. 310. Default means omission to do what a person is legally bound to do. 4 Pat. L.T. 418=71 I.O. 881. When execution proceedings are consigned to the record room behind the back of the decree-holder and without any default on his part, a further application, though in the form of a new application for execution is really a continuation of the previous application. 3 U.P.L.R. 13. When a decree was passed against A and his property was attached in execution of the decree, and an appeal was filed to the High Court from the decree and during the pendency of appeal the execution case was struck off on account of the decree-holders' default in paying certain requisite fees and the decree-holders applied for execution after the disposal of the appeal and applied for revival of the execution proceedings and for sale of the attached property it was held that the attachment was not withdrawn by reason of the dismissal of the application for execution. 37 A. 542. An interim order striking off an attachment pending an appeal does not release the property from attachment. 17 W.R. 294. Where an execution case is discontinued at the instance of an unsuccessful claimant who has brought a suit to contest the validity of the order in the claim case under O. 21, r. 63, the attachment continues to be in force. 46 C. 64 ; 24 I.C. 795 ; 44 B. 860. When the decree-holder accepts a certain payment from the judgment debtor and agrees to grant him time for the payment of the balance, upon which the court dismissed the execution proceedings, the dismissal, is for default of the decree-holder. 71 I.O. 881=1923 P. 446.

COURT.—The Collector has power to dismiss an application under r. 57 and the attachment ceases thereon. 4 N.L.J. 118 ; 1923 N. 18 ; 68 I.O. 643 ; 64 I.O. 420.

ADDITIONAL RULES MADE BY THE RANGOON HIGH COURT.—O. 21, r. 57-A.—A judgment-debtor may secure release of his attached property by giving security to the value thereof to the Court.

NO ATTACHMENT UNDER A PRECEPT SHALL CONTINUE FOR MORE THAN TWO MONTHS unless the period of attachment is extended by an order of the Court which passed the decree or unless before the determination of such attachment the decree has been transferred to the Court by which the attachment has been made and the decree-holder has applied for an order for the sale of such property. (S. 46 proviso).

DETERMINATION OF ATTACHMENT BY SALE.—When a judicial sale takes place, all previous attachments effected on the property fall to the ground. 55 I.C. 558=2 U.P.L.R. 106 ; 8 O.C. 409 ; 12 O. 317 ; 6 C.W.N. 57 ; 22 B. 88 ; 34 C. 836.

DEATH OF THE JUDGMENT-DEBTOR.—An attachment does not abate by the death of the judgment-debtor. 12 A. 440.

STRIKING OFF EXECUTION PROCEEDINGS OR TAKING THEM OFF THE FILE.—The striking off of execution proceedings admits of different interpretations according to the circumstances of a particular case. 1 C.W.N. 617 ; 22 C. 909 P.C. ; 2 B.L.R. 86 ; 20 W.R. 133 P.O. ; 17 M. 180 ; 8 O.C. 152 ; 10 I.C. 245 ; 15 W.R. 222 ; 24 W.R. 66 ; 20 W.R. 133 ; 23 A. 114 ; 11 C.W.N. 163 ; 17 W.R. 234 ; 10 C. 416 ; 21 W.R. 66 ; 8 W.R. 49 ; 24 W.R. 36 ; 12 W.R. 260 ; 39 C. 666 ; 12 W.R. 142 ; 6 A. 269 P.O. ; 1 C.L.R. 475 ; 13 C.L.R. 176 ; 20 I.C. 149 ; 5 N.W.P. 70 ; 1 A. 616 ; N.W.P. (1869) 51 ; A.W.N. (1885) 57. Stay of execution does not imply termination of attachment even if the proceedings are struck off. 9 W.R. 205 ; 12 W.R. 260 ; 8 C. 51 ; 8 I.A. 123 P.C. ; 4 C.L.R. 29 ; 13 C.L.R. 176. On an application for execution of a decree proving infructuous the decree-holder stated that he did not want to proceed with it, *held* that the proceeding arising out of the application *ipso facto* came to an end even in the absence of a formal order striking off the application to terminate the proceeding. 53 I.C. 111 ; 35 M.L.J. 387. The act of the Court in striking proceedings is only for the convenience of business and leaves intact all the proceedings taken up to that stage and the attachment thereby is not abandoned. 24 W.R. 36. When a Court strikes off a case, the order of the Court declaring that the attachment is subsisting is not bad in law. 1 C.W.N. 617. The striking off of a case puts an end to its attachment. 1 W.R. 318 ; 8 W.R. 415. The striking off of a case does not necessarily put an end to an attachment. 12 W.R. 142 ; 5 N.W.P. 70 ; 17 W.R. 15 ; 16 W.R. 11. When the decree-holder and the judgment-debtor agreed and obtained a postponement of the sale by payment to the decree-holder, a part of the money due, the mere formal entry in the record showing that the case was struck off the file was not of any effect. 6 W.R. 291. Where a case has been struck off the file for neglect of the party to pay the process-fee, an attachment previously made cannot subsist. 5 W.R. Mis. 4. When execution has been set aside *in toto* after being proceeded with to a certain point, the property is not under attachment. 8 W.R. 49. When execution proceedings are stayed for a certain period with an order, express or implied, as to continue attachment and proceedings struck off the attachment is not at an end. 9 W.R. 205 ; 8 C. 51 P.C. An order striking off a case for the convenience of the Court does not put an end to the attachment. 12 W.R. 260 ; 24 W.R. 36. Where there is only one application for attachment and the execution case is struck off, there is no attachment to affect subsequent alienations. 8 C.L.R. 157. The rulings above cited were under the old C. P. Code which did not provide for cases where the application for execution could not proceed for default of the decree-holder, and the practice was to strike off a case. The cases as to striking off an execution application are not likely to arise if the Courts have full regard for the provisions enacted in O. 21, r. 57.

ABANDONMENT OF ATTACHMENT.—Abandonment by the attaching creditor puts an end to the attachment and it may be inferred according to the circumstances

of each case. When the decree-holder puts in a fresh application for attachment, the attachment under the previous application may be considered as abandoned. 23 A. 114; 1 A. 616; 20 I.O. 149; 11 W.R. 517; 28 W.R. 513; 16 A. 133; 15 W.R. 222; L.B.R. (1893-1900), 340; 25 W.R. 513; 1 N.W.P. 30. An attachment not shown to have been released remains in force. 25 I.O. 906 = (1914) M.W.N. 796; 11 W.R. 517; 17 M. 180. A fresh application for attachment does not always imply abandonment under the first application. The burden is on the creditor to prove the contrary. 15 W.R. 222; 18 I.O. 691; 26 I.O. 81; 16 I.C. 387; 11 W.R. 517; 13 M.L.J. 221. Re-attachment after attachment before judgment does not show any intention of abandonment. 6 O. 129; 15 W.R. 222; 11 W.R. 517. The attachment was presumed to have been abandoned when a very large time expired between the original execution and the date of its being struck off. 20 W.R. 133, 135 P.O. (*contra* in 24 W.R. 56). 20 W.R. 418; 12 B.L.R. P.O. 411. When the parties applied for postponement of the sale, which was done, and the case struck off, there was no abandonment. 1 N.W.P. F.B. When the delay is due to the indulgence of the creditor towards his debtor for paying his debt it may be presumed not to be abandoned. 24 W.R. 56. If an attachment is made before judgment, the mere passing of a decree in the suit will not put an end to the attachment unless there is proof of an abandonment. 16 I.C. 387.

RELEASE OF PROPERTY FROM ATTACHMENT.—Where upon the said investigation the Court is satisfied that for the reason stated in the claim or objection such property was not, when attached, in the possession of the judgment-debtor or of some person in trust for him, or in the occupancy of a tenant or other person paying rent to him, or that being in the possession of the judgment-debtor at such time, it was so in his possession, not on his own account, or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the Court shall make an order releasing the property wholly or to such extent as it thinks fit from attachment. (O. 21, r. 60.)

For notes under this rule see *infra*.

REMOVAL OF ATTACHMENT UNDER ACT III OF 1874 (THE VATANDAR'S ACT).—By the first part of para. 10 of the Act, the Collector is authorized to inform the Court, by his certificate, what portion of the property has been assigned and the Court is bound, on receiving such certificate to cancel the pending attachment in so far as it might affect the portion so assigned. 4 B. 426.

THE REVIVAL OF ATTACHMENT.—If an *ex parte* decree is set aside the attachment ceases, but if the last order setting aside the *ex parte* decree is reversed the attachment revives and the attaching creditor is put in the same position as if the attachment continued from the very beginning. 12 W.R. 142. If the application for execution is dismissed, the attachment ceases under O. 21, r. 57; but if the order of dismissal is set aside by the High Court on appeal, the attachment revives. 19 A. 482; 8 A.L.J. 619; 34 A. 490; 31 A. 367; 23 O. 829; 80 P.R. 1903; 2 L. L.J. 99; (1918) Pat. 353 = 48 I.O. 385; 64 I.O. 420 = 18 N.L.R. 152; (*contra* in 18 C.W.N. 332 = 12 I.O. 65). The effect of a decree in a suit under O. 21, r. 63 establishing a right to attachment

after the release of the property in claim proceedings is to set aside the order of release and to restore the state of things which had been disturbed by the order. 21 W.R. 435 ; 22 W.R. 46 ; 23 O. 829 ; 10 B. 400 ; 31 A. 367 ; 6 A.L.J. 434 ; 3 C.L.R. 146 ; 20 W.R. 909 ; 33 C.L.J. 201—25 O.W.N. 544—62 I.C. 348 ; 41 M.L.J. 393—(1921) M.W.N. 642 ; 38 M. 533 ; 48 I.C. 386—5 O.L.J. 647 ; (*contra* in 6 M. 98) ; 38 M. 535. A revival of execution proceedings does not operate as a revival of the attachment so as to prejudice the rights of strangers who have in the interval acquired a right to the property. The reversal of judicial orders leaves unaffected the rights of strangers, *bona fide* purchasers, who have acquired title on the assumption that such orders were valid in law. 14 C.L.J. 476 ; 37 C. 107 ; 11 C.L.J. 254 ; 44 I.C. 864. When a decree-holder has attached the property of the judgment-debtor, in execution of a money decree, and, while he is seeking to establish his right to attach and sell such property as the property of the judgment-debtor, by suit against a successful claimant, the judgment-debtor not being a party to the suit or the claim proceedings, another decree-holder attaches the same property and brings it to sale, such an auction-purchaser is not to be affected by the rule of *lis pendens* and a subsequent purchaser at a court auction in execution of the decree in execution of which claim proceedings were taken, does not acquire a good title as against the prior auction-purchaser. 40 M. 955. When an application for execution of a decree has been interrupted by the intervention of objections and claims subsequently proved to be infructuous, a later application should be treated as a continuation or revival of the earlier one. 4 N.L.J. 213. The order under O. 21, r. 60 releasing the property is only provisional and the effect of a decree in a subsequent suit under O. 21, r. 63, declaring the right to attach the property is to maintain the attachment originally made. 2 Bur. L.J. 113—1923 R. 237. And the transfer made during the interval when there was no attachment is void as against claims under S. 64. 1922 R. 138—65 I.C. 220 ; 20 A. 421 ; 35 B. 516 ; 15 C. 771 ; 25 A. 431 ; 16 B. 91 ; 38 M. 50 ; 37 C. 796 ; 14 M.I.A. 543 ; 80 I.C. 905 (n) ; 38 M. 535. When the property is attached before judgment, and under a misunderstanding the order of attachment is set aside, but the attachment is subsequently restored, the restoration of the attachment has the effect of reverting the parties to the position they occupied when the property was originally attached and a private sale of property in the interval is void. 42 A. 39. The decree-holder's rights are not affected by a temporary discontinuance of attachment. 2 L.L.J. 99 ; 31 A. 367 ; 23 C. 829 ; 80 P.R. 1903. When the lower court set aside the attachment, the order of the appellate court on appeal remanding the case does not revive attachment. 22 C. 9 P.C. When an unsuccessful claimant and plaintiff appealed from the decree and during the pendency of the appeal the property was purchased at the execution sale brought about by the decree-holder such purchase was held to be affected by *lis pendens*. 23 A. 60. When the decree of the Court of first instance is reversed on the first appeal, but restored on the second appeal, the result of the decision in the second appeal is to revive the attachment which under the provisions of O. 21, r. 55 is deemed to have been withdrawn in consequences of the decree on first appeal. 48 I.C. 386—5 O.L.J. 647.

Setting aside Sale.—Where an execution sale is set aside for any reason other than the default on the part of the decree-holder, the attachment which had been obtained prior to the sale revives to support a subsequent application for execution and no fresh attachment is necessary. (1918) Pat. 343—45 I.C. 589 ; 34 A. 490 ; 20 W.R. 21 ; W.R. 1864, 26 ; 21 W.R. 435 ; 5 W.R. P.C. 7 ; 12 W.R. 142 ; A.W.N. (1881) 5. The setting aside of a sale for irregularity does not terminate attachment. 20 W.R. 19.

WITHDRAWAL OF ATTACHMENT.—Additional rules made by the Allahabad High Court.—O. 21, r. 116.—When an application is made for the attachment of live-stock or other moveable property, the decree-holder shall pay into Court in cash such

sum as will cover the costs of the maintenance and custody of the property for fifteen days. If within three clear days before the expiry of any such period of fifteen days the amount of such costs for such further period as the court may direct be not paid into court, the court on receiving a report therefrom from the proper officer, may issue an order for the withdrawal of the attachment and direct by whom the costs of the attachment are to be paid.

O. 21, r. 130.—The costs of preparing attached property for sale, or of conveying it to the place where it is to be kept or sold, shall be payable by the decree-holder to the attaching officer. In the event of the decree-holder failing to provide the necessary funds, the attaching officer shall report his default to the Court, and the Court may thereupon issue an order for the withdrawal of the attachment and direct by whom the costs of the attachment are to be paid.

VII.—INVESTIGATION OF CLAIMS AND OBJECTIONS TO ATTACHMENT.

SCOPE OF THE RULES.—Rule 58 refers to claims or objections regarding attached property on the ground that the property is not liable to attachment. Where the claimant does not object to the attachment at all and is quite willing that the property should be attached but wants that his possessory mortgage should be proclaimed at the time of sale, the objection does not fall either under r. 58 or r. 62, the latter rule having reference to mortgages or charges in favour of some person not in possession. 83 I.O. 869 = 11 O.L.J. 240. R. 58 applies only when the objection is taken that the property attached is not liable to attachment. 84 I.O. 265 = 47 M.L.J. 720 ; 1926 M. 355 = 91 I.O. 414. Claims to property attached before judgment are covered by these rules. The policy of law is that questions of title raised by claims against attachment before or after judgment should be promptly disposed of. 41 M. 849 F.B. ; 37 A. 578 ; 6 L.W. 519. When a certain property is attached before judgment, and sold on account of its perishable nature in the suit of A, and B in execution of his own decree attaches the money so deposited in Court, but his application for payment was rejected on the application of A, who afterwards obtained the decree, held that the application of B was under O. 21, r. 58 and that B could bring a suit for the payment of money under O. 21, r. 63. 37 A. 578.

Retrospective effect.—The provisions of O. 21, r. 58 are retrospective and do not apply to proceedings in execution under the old Code. 9 W.R. 292 ; 8 W.R. 62 ; 7 W.R. 138.

These rules do not apply in cases where attachment of property is unnecessary. O. 21, r. 58 does not apply where the property in dispute is directed to be sold under a mortgage decree and the mere fact that there has been an attachment does not make the rule applicable. 14 Bur. L.R. 201 ; 4 O. 631 ; 26 C.W.N. 50 ; 12 C. 453 ; 15 C. 674 ; 4 B. 515 ; 2 B.L.R. 138 ; 18 B. 98 ; 1 N.L.R. 142 ; 58 P.R. 1918 ; 18 I.C. 215 ; 14 O. 631 ; (1919) Pat. 79 = 50 I.C. 448 ; 58 I.O. 895 = 2 L.L.J. 343 ; 27 A. 700 ; L.B.R. (1893-1900) 509 ; 29 I.C. 941 = 8 Bur. L.T. 214 ; 12 C.P.L.R. 73 ; 4 L.B.R. 82 ; 1 C.W.N. 701. In such a case if the Court passes an order on such an application, the High Court will interfere in revision. 58 P.R. 1918 ; 1 N.L.R. 142 ; (1919) Pat. 79 = 50 I.C. 448. On the contrary it is held in Burma that if the decree-holder applies for and obtains an order for attachment of property and it is attached, claims and objections to attachment must be dealt under these rules. 14 Bur. L.R. 201. These rules are inapplicable when there is no attachment. When in the execution of A's decree against B, O's (father of B) property was sought to be attached, but O paid the amount named in the warrant under protest he cannot apply under O. 21, r. 58 for return of the money. 9 S.L.R. 213 = 34 I.O. 492. When specific moveable property has been attached by a prohibitory order under O. 21, r. 46 the objection can be raised under r. 58 ; 14 C.P.L.R. 124 ; 24 M. 20. Claims to a share of moveable property attached in execution must be investigated by the Courts under these rules.

14 W.R. 52 ; 17 W.R. 74. When money is paid to release attachment in execution of a decree, it cannot be made the subject of a claim under these rules. 1 Ind. Jur. N.S. 248.

Debts.—These rules apply in the case of attachment of debts. The words “possessed of” in rr. 60 and 61 are not restricted to objects capable of physical possession, but apply also to objects capable of constructive possession, such as a debt. The word “property” in r. 58 is wide enough to include a debt. 27 M. 67 F.B. ; 38 B. 631 ; 33 C. 487 ; 4 L.B.R. 289 ; 72 I.C. 558=44 M.L.J. 588 ; 71 I.C. 45 (Pun.) (*contra* was held in 4 B. 323 ; 10 M. 194 ; and 20 M. 24 which was overruled in 27 M. 67 F.B.). The procedure as laid down in O. 21, r. 58 applies to a debt attached in execution of a decree and an order made against the alleged debtor is binding upon him if he does not institute a suit for a declaration that no debt was due from him under O. 21, r. 68. 71 I.C. 45 (Pun.).

Money lying in Court.—These rules apply in the case of money lying in Court. 19 C. 286. These rules contemplate the liability or non-liability of the property attached. They do not contemplate to establish the liability of third parties. 23 C. 302.

Insolvency of the judgment-debtor.—The provisions of r. 58 with respect to attachment are not affected by the insolvency of the judgment-debtor and the investment of the property in the Receiver. 5 A. 232.

OBJECT OF THE RULES.—The object of these rules is to give a claimant a speedy and summary remedy, but the rules do not deprive him of his remedy by suit. The summary remedy given by these rules is in addition to the remedy by way of suit. 23 B. 260 ; U.B.R. (1897—1901) Vol. 2, 267, 262.

APPLICABILITY.—Attachment under Provincial Insolvency Act.—An attachment under S. 13 (3) of the Provincial Insolvency Act III of 1907 is analogous to attachment before judgment and the objection petition should be inquired into as if under O. 21, r. 58. A party whose property is attached need not wait to put in his claim till the receiver takes possession of the properties. 36 A. 65. When in proceedings under the Provincial Insolvency Act a receiver is appointed and he takes possession of the property of the insolvent, any person objecting to the same on the ground that the property does not belong to the insolvent should apply under S. 22 of Act III of 1907. O. 21, r. 58 does not apply to such applications. A decision under S. 22 of the Act passed by a District Court under the Act is not open to appeal under S. 46 without obtaining leave to appeal from District Court or the High Court. 36 A. 8.

Bengal Tenancy Act.—When some of the co-sharers got a decree for rent and others were made defendants in the suit, the latter cannot object to attachment under O. 21, r. 58. 15 C.W.N. 820=8 I.C. 50, on the ground that the entire holding is not liable. In execution of a decree for arrears of rent in respect of a holding within the meaning of S. 170 (1) of the B.T. Act the provisions of O. 21, r. 58, do not apply and therefore no claim can be allowed to be made to the holding which is put up for sale in execution. 8 I.C. 50. But a claim is entertainable if the decree for rent is in respect of two holdings, it being not a rent decree as contemplated in Ch. XIV of the B.T. Act, 36 C. 765 ; 28 C. 328 F.B. (4 C.W.N. 734 overruled). Where the claimant contended that the attached property was homestead not governed by the Act the provision of the rules were held applicable. 7 I.C. 490=12 C.L.J. 549. By virtue of S. 170 of the B. T. Act, O. 21, r. 58 does not apply to an execution of a rent decree. 1926 P. 210=3 Pat. L.R. 339.

Companies Act, 1912.—The right of appeal under the provisions of the Companies Act, 1912, is co-extensive with the right of appeal conferred by the O.P. Code. Hence where in liquidation proceedings a person described as the proprietor of a firm was directed to pay a certain sum as a contributory and the order was sent to the District Judge to be executed and another person claimed to be the sole proprietor of the firm, whose claim the District Judge declined to adjudicate upon, held that the claim purported to be under O. 21, r. 58 of the C.P. Code and the order passed was one under r. 63 and consequently there was no appeal. 38 A. 537.

Agency tracts.—The remedy by way of claim petition does not exist in the Agency courts and the institution of a suit is the only remedy available to a person whose property has been attached in execution of a decree obtained against a third person. 42 M.L.J. 487=66 I.C. 115. According to the law prevailing in Vizagapatam Agency an action will not lie for a declaration that an attached property in respect of which a claim has been allowed belonged to the judgment-debtor. 29 M.L.J. 730=32 I.C. 226.

Presidency Small Cause Courts.—These rules are inapplicable to these Courts by S. 9 of the Presidency Small Cause Courts Act. 18 O. 296.

NATURE AND SCOPE OF INVESTIGATION.—The questions which have to be considered during the investigation under O. 21, r. 58 are comparatively simple; and questions of legal right and title are not relevant except so far as they may affect the decision as to whether the possession is on account of or in trust for the judgment-debtor or some other person. 1 L.B.R. 80; 4 L.B.R. 289. These rules contemplate a summary investigation into the question of possession and the question of title is to be gone into only to determine whether the person in possession holds such possession as agent of or as trustee for another. 1 O.W.N. 617. In claim investigation, the duty of the Court is to ascertain who was in actual possession of the property at the time of attachment. It will not go into the question of fraudulent possession. 13 Bur. L.T. 214=64 I.C. 66. The Court should refuse to enter into the merits of the case, when there is *prima facie* evidence in favour of the claimant which is all that is necessary for an order in summary proceedings. The merits of the case could be agitated by the aggrieved party in a suit under O. 21, r. 63. 9 I.C. 260; 9 M.L.T. 483. Claims under O. 21, r. 58 are not solely for possession. They are claims to or objections to attachment of property. The claimant must advance evidence to show that at the date of attachment he had some interest in or was possessed of the property attached. 2 Bur. L.R. 134. When a *prima facie* objection has been established, the proper procedure for the Court is to refer the objector to a regular suit. 44 P.R. 1866. When an application is made under O. 21, r. 58 the only questions to be determined is whether or not the judgment-debtor was in possession of the property at the time when the attachment was made. 21 W.R. 56. The Court has jurisdiction to disallow the claim on some grounds other than the question of possession. 34 A. 365. When the property is in the possession of the claimant the attachment must be raised. 2 Ind. Jur. N.S. 339. The only question for consideration is whether the property attached is in the possession of the judgment debtor or of some person in trust for him or whether it was in the possession of a third party in trust for him. 16 W.R. 119. In deciding a question under r. 58 the Court should confine itself to determine whether or not the property was in possession of the claimant on his own account at the time of attachment. 1 O.C. 1057; (1925) M.W.N. 590. The question for determination under these rules is one of possession. The use of the words "the possession of the trustee for the judgment-debtor" means the possession for the judgment-debtor. There is no need for entering into intricate questions of the validity of the trust, etc. 14 C. 617. The order referred to in O. 21, r. 63 is the order with reference to the right to claim the property in dispute and not the order with reference to the fact of possession.

at the time the order was made. 35 M. 95. The policy of the Legislature is to secure the speedy settlement of questions of title raised at execution sales. 15 C. 521; 1926 N. 197=90 I.C. 196. Rights relating to property for beyond the pecuniary jurisdiction of a Court in regard to suits cannot be disposed of on the claim petition, 90 I.C. 196.

Question of title.—In an enquiry into the claims to attached property, the Court may in a proper case, go into the question of title, and is not necessarily restricted to an enquiry into possession. 10 Bur. L.T. 14=39 I.C. 275. Where in an enquiry under O. 21, r. 59 a claimant to an attached property does not adduce any evidence as to possession, the Court is justified in confining itself to the question of title. 32 I.C. 34. An order in claim proceedings is not restricted to the determination of the rights relative to physical possession, but also can determine questions of title. 8 M.L.T. 381. A claimant in attachment proceedings must prove that he is the owner of the property. If he fails he has no further interest in the proceedings. He may prove title by adverse possession. 45 B. 1020. These rules contemplate a summary investigation into the question of possession and the question of title is to be gone into only to determine whether the person in possession holds such possession as an agent or trustee for another. 1 C.W.N. 617. Ordinarily where property attached as being the property of the judgment-debtor is claimed by a third person, such person may file a claim and where the Court has jurisdiction to try the question, the title to property is determined in execution proceedings. 31 C. 340 (*contra* in 29 C. 543—In an investigation under these rules what the Court has to determine is merely the question of possession, it cannot go into the question of title. See also 14 C. 617; 18 C. 290.) Under Ss. 68, 70 and 71, C. P. Code, a Collector is not empowered to adjudicate upon question of title under O. 21, r. 58. 9 C.P.L.R. 113; 3 N.L.R. 164.

Claimant in possession under collusive sale.—A judgment-debtor with the object of defrauding his creditors, executed a collusive sale-deed of his property in favour of a third person who was put in possession and who preferred a claim to the property under O. 21, r. 59 when it was attached by the creditor in execution of his decree, it was held that the claim should be rejected on the ground that the property was in possession of the claimant in trust for the judgment-debtor within the meaning of O. 21, r. 61; it was necessary in order to defeat the claim to show that the trust was one capable of enforcement. 18 C.W.N. 959=17 I.C. 12. In an investigation of claims to property under attachment, the Court should consider whether the judgment-debtor was or was not in possession of the property, and if in possession whether he was in possession on his own account or in trust for some other person. If this involves a decision as to *bona fides* of an alleged sale or the legal effect of the deed of conveyance or the circumstances attending its registration, the Court ought to go into such matters. 11 Bur. L.T. 118=43 I.C. 182.

Benami purchases.—The Court is bound to inquire into the question whether the property was purchased by the claimant *benami* for the judgment-debtor or not, and whether the property is or is not in the possession of the party against whom the execution is sought or of some other person in trust for him. 20 W.R. 202; 1 A. 101. When on a claim it was found that the property was purchased in the name of the judgment-debtor and the claimant's husband, but the purchase-money came wholly out of the latter's pocket and he and the claimant were in possession since 1902, held that the claimant being in possession in her own right, her claim ought to be held and the attachment should be raised. 28 M.L.J. 327. It is not necessary for the purchaser to prove that consideration did pass. The burden of proving that the deed is fraudulent and collusive is on the party alleging it. 9 Bur. L.T. 199=34 I.C. 125. The Court cannot go into the question of benamidar's title and on an objection by the benamidar the Court ought to release the property from attachment, if the objector is proved to be the claimant. 29 C. 543; 14 C. 617; 18 C. 290.

CLAIMANT HAVING AN INTEREST IN THE PROPERTY.—An objector may raise an objection to the attachment of property not only on the ground that he is in possession of it, but also on the ground that he has an interest in the property attached. 34 A. 365. Rule 59 does not mean that if the claimant establishes that he has some interest in the property, he is entitled to succeed irrespective of the question of possession; nor does it imply that if he fails to establish the particular interest he sets up, his claim must be disallowed irrespective of the question of possession of the judgment-debtor. In each of the cases mentioned in rr. 60 and 61 the Court must determine the question of possession of the judgment-debtor and cannot found its decision merely on the question of the validity of the claim or of the title to the attached property. 24 I.C. 62.

DELAY.—If a Judge is of opinion that an application under O. 21, r. 58 has been designedly or unnecessarily delayed, he may refuse an investigation. But if he makes an investigation he is bound to pass order under O. 21, r. 60 or r. 61, C.P. Code, and the dismissal of the application on the ground of delay after investigation has been made is illegal. 11 Bur. L.T. 41=39 I.C. 345. The proviso to r. 58 (1) applies even to cases where the Court without jurisdiction becomes possessed of the property attached in execution by the usurpation of authority. 41 I.C. 446.

WHETHER THE EXECUTION IS TIME BARRED.—In proceedings under r. 58, the Courts deal with the point whether execution is time-barred. 2 Pat. L.T. 275=60 I.C. 375.

BURDEN OF PROOF.—If a Court finds that the claimant was in possession at the time of attachment, and it is not proved by the attaching creditor that the claimant was in possession in trust for the judgment-debtor, the Court should remove the attachment. If a claimant to property proves that he was in possession at the time of attachment the burden of proof that he is not the owner or that he holds in trust for the judgment-debtor is on the decree-holder and if he fails to discharge it, the Court should remove the attachment. 2 L.B.R. 152; 4 L.B.R. 269; U.B.R. (1904) 4th Qr. C. P. Code 3; U.B.R. (1905) 18th Qr. C.P. Code 16. In a proceeding in execution of a decree the claimant should begin and must prove that the property belonged to him, or was in his own possession. 11 W.R. F.B. 18; 20 W.R. 345. It is for the claimant to prove that the attachment is not legal. A.W.N. (1899) 127.

WHO CAN OBJECT TO ATTACHMENT UNDER THE RULES.—The words "as if he was a party to the suit" in r. 58 clearly points out that under these rules only those persons can apply who were not parties to the suit as defined under S. 47, C.P. Code. Any person who can apply under S. 47 cannot apply under these rules. Any person (e.g. a reversioner) who had some interest in or was possessed of the property attached at the date of attachment can apply to set it aside. 71 I.C. 1072=1923 A. 292; 1925 A. 240. Any person who has an interest in the property may apply under r. 58 although he is not in possession. 10 I.C. 994=(1910) 1 U.B.R. 75. Some interest means such interest as would make the possession of the judgment-debtor possession not on his own account but on account of or in trust for the claimant. 1 C.W.N. 617.

Mortgagors and Mortgagees.—A petition by the simple mortgagee of properties belonging to the judgment-debtor and attached in execution by the decree-holder, praying that the properties should be described in the sale proclamation as being subject to the simple mortgage in favour of the petitioner and sold subject to the mortgage is a petition "falling within the provisions of O. 21, r. 58. 27 M.L.J. 159; 52 I.C. 720; (1913) M.W.N. 279; 26 M.L.J. 565; 2 Bom. L.R. 476. A mortgagee of the property attached may apply under r. 58 that the property may be sold subject to his mortgage. 37 M.L.J. 159=52 I.C. 720; 81 I.C. 1018=1925 O.C. 154. Claims

founded on mortgages are as much within O. 21, r. 58 as any other claims to property attached. 31 M.L.J. 247=38 I.C. 937. When property which is in the possession of the mortgagee is attached in execution of the decree, the mortgagee can claim to have the attachment removed under O. 21, r. 60. In such a case it is only the equity of redemption that can be attached and sold. 11 O.L.J. 239=81 I.C. 648; 10 B.H.C. 100; 80 I.C. 428=1925 C. 296. A mortgagee in possession is in possession on account of or in trust for the mortgagor to the extent of the property mortgaged. The property is not in the mortgagee's possession as his own property, but partly on his own account and partly on account of the mortgagor. Hence where the mortgaged property in possession of a mortgagee is attached as his property and the mortgagor prefers a claim against the attachment, the claim should be investigated and the property released from attachment to the extent of the mortgagor's interest. So far as the interest of the owner and mortgagor is concerned the property is liable to attachment. (1910) 1 U.B.R. 75=10 I.C. 994. A usufructuary mortgagee in possession cannot object to attachment under O. 21, r. 58. When such a mortgagee is deprived by the purchaser at an execution sale, he is entitled to apply to the Court under O. 21, r. 100, and his application is not barred by the period of one year by O. 21, r. 63. 1922 P. 403=1 P. 159. A filed a suit on a mortgagee against B and obtained a decree for sale of the mortgaged property. Profits of the mortgaged property were deposited in Court to the credit of A's suit by a receiver. C, who held a decree against B in another suit, attached the profits and applied under r. 179 of the Civil Rules of Practice (Madras) for the issue of a cheque for a sufficient part of the attached money. A's objection claiming the charge on the amount due to him for any balance that might be due to him after sale of the property falls under O. 21, r. 58. 37 I.C. 348. A beneficial or equitable interest is as much an interest within the meaning of O. 21, r. 59 as a legal interest in the property attached. The mortgagees have an interest in the property attached as that of the mortgagor, and they have a right to have it declared that the property be sold subject to their rights of mortgage. 25 M. 555; A.W.N. (1891) 220. An objection by the usufructuary mortgagee must be allowed and the property should be released and if it can be inferred that the intention of the decree-holder was not to attach the property itself but the equity of redemption, the attachment may be allowed to continue upon the equity of redemption. 80 I.C. 423. Where a person is impleaded as a party to the suit and no decree is passed against him, his objection to the attachment on the ground of a conveyance executed by the deceased judgment-debtor in his favour, falls under S. 47 and not under these rules. 34 C.L.J. 477; 87 I.C. 743. The legal representative of the judgment-debtor cannot claim under these rules merely on the ground that the decree-holder did not mention his name in the application for execution, especially when in prior proceedings he was made a party and had admitted the liability of the property in his hands. 91 I.C. 414.

A purchaser subsequent to attachment.—When after the attachment of the judgment-debtor's property in execution of a money decree, the property was sold in execution of a mortgage decree and the purchasers applied to the Court for exempting the property from sale *held* that the purchase being subsequent to attachment, the application could not be treated as a claim or objection under O. 21, r. 58. 15 C.W. N. 592.

Purchasers before attachment.—A transferee of the property is entitled to prefer an objection to the attachment. 123 P.L.R. 1912=13 I.C. 563.

Persons wrongly impleaded as defendants.—Persons who are wrongly impleaded as defendants in execution proceedings but did not prefer any claim to plaintiff's attachment and sale are not thereby estopped from making a claim subsequently. 9 M.L.T. 75=82 I.C. 161.

The divided sons of a Hindu father can object to attachment under these rules if the liability of the sons is not to be enforced for their father's debts, but the attachment is made with respect to the property of the father alone. 8 I.C. 13; 8 M.L.T. 349. An order under O. 21 r. 63 rejecting the reversioner's claim to possession does not disentitle him to bring a regular suit even after one year. 20 B. 801.

Character in which the judgment-debtor or his representative objects.—When A in execution of a decree for money against Y as shewait of a deity attaches and proceeds to sell properties of which Y or his successor in office alleges that he is in possession not as shewait of the deity, but in his own right, the case falls under O. 21, r. 63; 42 O. 440. A person, who is impleaded in the execution proceedings as the heir of the deceased judgment-debtor, can object to attachment under these rules on the ground that he was a trustee of the property. L.R. 4 A. 447. A person against whom there is a personal decree claiming property which has been attached under such decree, on the ground that he holds it as trustee for persons not parties to the suit comes under rr. 58—63, and not under S. 47. 23 M. 195 F.B.; 10 M.L.J. 85.

A claim by a judgment-debtor to property attached in execution of a decree on the ground that he held it in trust must be preferred under O. 21, r. 58, and not under S. 47, O.P. Code either, independently or with his other objections. 38 I.C. 152.

Owner of the property.—An objection to the attachment of property on the ground that it does not belong to the judgment-debtor is to be urged by the person claiming ownership of the property and none else. 40 M.L.J. 124=62 I.C. 255.

Official Receiver.—Claims by the official receiver, when the order of investment is after the attachment objected to, do not fall under these rules. The order of the court releasing the property from attachment is under S. 151, O.P. Code, and not under O. 21, r. 60. 41 M.L.J. 334=(1921) M.W.N. 775. When a vesting order has been made after attachment before judgment and before decree in suit, the title of the Official Assignee takes effect and prevents the attaching creditor from obtaining a sale of the property attached. The Official Assignee is entitled to apply for release from attachment of the property before the defendant is declared an insolvent. 20 B. 403.

POSSESSION ON HIS OWN ACCOUNT.—It would cause great inconvenience and injustice to hirers if the judgment-creditor of an owner were at liberty to have the hired cattle seized and sold in execution of a decree against the owner during the period for which he has hired out and the Court ordering attachment would be robbing the hirers of an actual right to possession although that right is only for a limited period. 2 L. B.R. 152. When the judgment-debtor consigned certain goods to the claimant at Bombay for sale on commission and drew four Hundis against the goods which the claimants' firm accepted and paid on receiving the railway receipts by post and the creditors of the judgment-debtor attached the goods on their arrival at Bombay, it was held that the claimants had the goods in their possession on their own account as they were to pay their advances out of the proceeds of such sale. 21 C. 287; 9 I.C. 285=21 M.L.J. 413. When property is transferred to a third person *bona fide* for consideration that property must be regarded as his. 18 C. 290.

TIME FOR TAKING OBJECTION TO ATTACHMENT.—It is obvious that after a sale is held the attachment is *ipso facto* determined, and the court has no jurisdiction to entertain the claim case. 74 I.C. 87=4 Pat. L. T. 544. The objection to attachment cannot be taken for the first time before the Privy Council. 6 O. 129 P.C. It is competent to a civil court to entertain an objection to attachment after the property had been sold, but before the confirmation of sale. 1 N.L.R. 167. After a property,

which has been attached in execution, has been sold, the court has no jurisdiction to hear an application putting forward a claim which if successful would result in the release of the attached property. 1926 C. 468—87 I.C. 168.

PROCEDURE IN INVESTIGATION.

INVESTIGATION OF CLAIMS TO AND OBJECTIONS TO ATTACHMENT OF ATTACHED PROPERTY.—(1) Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector, and all other respects, as if he were a party to the suit:

Provided that no such investigation shall be made where the court considers that the claim or objection was designedly or unnecessarily delayed.

(2) Where the property to which the claim or objection applies has been advertised for sale the Court ordering the sale may postpone it pending the investigation of the claim or objection. (O. 21, r. 58.)

EVIDENCE TO BE ADDUCED BY CLAIMANT.—The claimant or objector must adduce evidence to show that at the date of the attachment he had some interest in, or was possessed of, the property attached. (O. 21, r. 59.)

RELEASE OF PROPERTY FROM ATTACHMENT.—Where upon the said investigation the Court is satisfied that for the reason stated in the claim or objection, such property was not, when attached, in the possession of the judgment-debtor or of some person in trust for him, or in the occupancy of the tenant or other person paying rent to him, or that, being in the possession of the judgment-debtor at such time, it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the Court shall make an order releasing the property wholly or to such extent as it thinks fit, from attachment. (O. 21, r. 60.)

SCOPE.—A release can only be ordered under the provisions of O. 21, r. 60. This rule gives the conditions under which the release can be ordered. Therefore the conditions must be established. 8 Bom. L.R. 794.

DISALLOWANCE OF CLAIM TO PROPERTY ATTACHED.—Where the Court is satisfied that the property was, at the time it was attached, in the possession of the judgment-debtor as his own property and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of a tenant or other person paying rent to him, the Court shall disallow the claim. (O. 21, r. 61.)

CONTINUANCE OF ATTACHMENT SUBJECT TO CLAIM OR ENCUMBRANCE.—Where the Court is satisfied that the property is subject to a mortgage, or charge in favour of some person not in his possession and thinks fit to continue the attachment, it may do so, subject to such mortgage or charge. (O. 21, r. 62.)

ORDER OF THE COURT IN CLAIM PROCEEDINGS.

EFFECT OF THE ORDER OF THE COURT.—Where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive. (O. 21, r. 63.)

PARTY AGAINST WHOM AN ORDER IS MADE.—When the claim is allowed the aggrieved parties are the decree-holder and the judgment-debtor. A judgment-debtor who is not a party to the claim proceedings does not become "a party against whom an order is made" by reason solely of his being a judgment-debtor; and the order is not binding upon him. 6 M.H.O. 416; 15 C. 676; 2 B.L.R. App. 49; 1 M. 991; 4 M.H.O. 272; 3 A. 233. A judgment-debtor is not a necessary party to proceedings under these rules. 9 M.L.T. 423. A judgment-debtor is not a necessary party to these proceedings so as to disentitle him to a suit after the lapse of one year. 15 C. 674; 3 O.L.R. 381. If the judgment-debtor is a party to the claim proceedings, he is bound by the order and it is conclusive against him also under O. 21, r. 63. 30 M. 395 F.B.; 31 M. 163; 11 B. 114; 15 C. 674; 31 A. 514; 17 B. 629; 13 M. 366; 25 M. 721; 3 C.L.R. 81; 13 M.L.J. 367; 22 B. 875; 8 I.O. 157=8 M.L.T. 417. Whether the judgment-debtor is to be regarded as a party to objection proceedings must depend upon the facts of each case. When the contest has been throughout between the judgment-debtors, and the objector they are regarded as parties. 84 P.R. 1914. A judgment-debtor is not necessarily a party to an investigation under O. 21, r. 56, so as to preclude his instituting a suit after the lapse of one year of the date from the date referred to in O. 21, r. 63, to establish his right to the property which has been

the subject-matter of action in execution proceedings, 15 O. 674 ; 3 O L.J. 381 ; 9 M. L.T. 428. It must be shown that a notice of the claim was served on the judgment-debtor before he can be held to be bound by the order of the Court. 9 M.L.T. 423, 453 ; 28 A. 41 ; 21 M.L.J. 550. Whether a judgment-debtor is a party or not depends on the facts of each case. It is for the person who sets up the special bar against the judgment-debtor to show that he was a party to the execution proceedings. 13 M. 366 ; 13 M.L.J. 367 ; 31 M. 167. Notwithstanding the fact that the judgment-debtor was a party to a claim petition, put in a statement claiming the property, and actively contested the claimant's rights thereto, when the Court does not adjudicate upon the title of the judgment-debtor, and confines itself expressly to the question of possession, the judgment-debtor is not bound by the order under O. 21, r. 63. 54 I.C. 530 = 37 M.L.J. 547. The attaching judgment-creditor against whom an order is made cannot raise the defence that as the purchaser of the property he is the representative of the judgment-debtor and therefore is entitled to avoid the operation of the adverse order as the judgment-debtor was not a party to it, 35 M. 35. An order under O. 21, r. 63 will not bind a stranger auction-purchaser, he being the representative neither of the judgment-debtor nor of the decree-holder. 35 B. 275. When the claim is allowed and the judgment-debtor is not a party to claim proceedings, the decree-holder is bound by the order and the fact that the judgment-debtor has a remedy by suit in an ordinary way, cannot give the decree-holder the right of the judgment-debtor. 35 M. 35 ; 1 N.L.R. 150.

Claims by two persons allowed.—Where a mortgagee of the property attached succeeded in his claim under the rules and the property was ordered to be sold subject to the mortgage, and thereafter another person put in a claim to the same property claiming by a title antecedent and superior to the first person's title under the mortgage and the claim was allowed, *held* that the first claimant was entitled to bring a suit for reversal of the order allowing the claim of the latter and for a declaration of his title under the mortgage. (The mortgagee was not a party to the subsequent proceedings). 6 B.L.R. 320.

When the claim is disallowed, it is only the claimant against whom an order is made. If the judgment-debtor was a party to the claim petition, a subsequent claim to a fresh attachment is barred. 8 C. 871. A decree in favour of the judgment-debtor in a suit under O. 21, r. 63 does not enure for the benefit of the decree-holder and the latter cannot reattach the property. 44 I.C. 864.

WHAT ORDERS FALL UNDER THESE RULES.—The order to come within the purview of these rules must be one made after investigation within the meaning of r. 58. 40 A. 325 ; 87 P.R. 1904 ; 1 C.W.N. 24 ; 3 A. 504 ; 12 C. 108 ; 1 C.L.J. 296 ; 16 W.R. 69. When a court released the attached property without making any inquiry on an application by the claimant, the order cannot be regarded as one under O. 21, r. 63 and the period of limitation (one year) does not apply to such a case. 16 W.R. 22. Where no investigation was made and the order made against the claimant was not that he had failed in making out his case, but that the court refused to enquire into his case, the suit may be brought at any time within the general period of limitation applicable to it. 4 B. 21 ; 4 B. 611. When the court disallows the claim to attached property by reason of the claimant not having given any evidence in support of his claim the order is one made under O. 21, r. 63. 21 W.R. 309, 409 ; 8 A.L.J. 626 ; 32 C. 537 ; 17 M.L.T. 223 = 28 I.C. 244 ; 12 C.L.R. 43 ; 20 W.R. 348 ; 1 C.L.J. 296. The new Code has introduced a modification into the old law and any order on objection made by a third party to attachment of property in execution of a decree is now conclusive whether the order was passed summarily or after investigation. 66 P.R. 1917. An order of the court without enquiring into and determining the question of possession as between the objector and the judgment-debtor and referring the decree-holder to a regular suit has not the effect of an order under O. 21, r. 63 and does

not estop the claimant to bring a regular suit beyond one year. 6 N.W.P. 185 ; 22 B. 875. Where an order on a claim petition merely says "there is nothing to show that petitioner's lands have been attached, the order is not one passed after investigation and is therefore not within O. 21, r. 63. 18 M. 316. An order after inquiry is an order under rule 63. A.W.N. (1886) 68. It does not follow that because a claimant does not adduce evidence or is absent there are no materials before the court to enable it to enquire into it. 40 A. 325. An order made under O. 21, r. 58 although without investigation and for default is conclusive and the period of one year for a suit under Art. 11, Indian Limitation Act, is applicable in such cases. 45 O. 785. An order refusing to investigate a claim under O. 21, r. 58, is one under O. 21, r. 63 and conclusive. 41 M. 985 ; 45 A. 438 ; 1 R. 481. O. 21, r. 63, is much wider than the corresponding section of the old Code. (ibid). It is not possible to define the amount of the inquiry which constitutes an investigation. If the order purports to deal with the claim on merits it must be taken that there has been an investigation. 29 M. 225. The investigation under these rules should be thorough and full. U.B.R. (1897 - 1901) Vol II, page 262. Fixing of a date of hearing, giving an opportunity to the claimant to adduce evidence, his putting in a list of witnesses and issuing of no process on account of failure to put in proper fees ; and when the claimant asked for time, refusing to grant him time, and dismissing the claim amount to sufficient investigation under the rules. 32 C. 537. An order under O. 21, r. 63 must be one passed on an adjudication on the claim asserted. When an order is passed by a court without entering into the merits and the rights of the parties and without adjudicating on the claim, it could not be treated as one falling under O. 21, r. 63. A.W.N. (1894) 14. An order under O. 21, r. 60 and r. 62 of O. 21, is not an operative order if there has been no investigation. An order passed to the effect that a bond produced by the claimant is not genuine, although it may be open to criticism on the ground that it is based on the mere examination of the deed, without a fair opportunity of proving it having been given to the claimant, is nevertheless an operative order. 19 O.C. 357 = 39 I.C. 92. An order dismissing an application, presented under r. 58, for default is not such an order. 31 M. 5 ; 4 C.W.N. 487 ; 62 P.R. 1894. A claim under O. 21, r. 58 rejected on account of unreliable evidence is on the same footing as if there had been no evidence and the order rejecting it is on merits and not on default. 20 W.R. 345 ; 1 C.L.J. 296. But see 1 C.W.N. 24. An order disallowing a claim under O. 21, r. 58 for want of prosecution is conclusive subject to the suit under O. 21, r. 63, 11 O.C. 180 ; 15 W.R. 311 ; contrary view taken in 7 W.R. 24 ; 3 A. 504 ; 13 C.P.L.R. 69 ; 87 P.R. 1904. An order dismissing a claim for default is an order within the meaning of O. 21, r. 63 and subject to the result of a separate suit is final, 26 C.W.N. 126 ; 24 O.C. 213 = 64 I.C. 209 ; 26 P.L.R. 151. When an application under O. 21, r. 58 is dismissed for default, it is impossible to hold that there has been an investigation on the merits so as to satisfy the test of Art. 11 of the Limitation Act. To much a case therefore, the article does not apply. 31 M. 5 ; 29 M. 225 ; 1 C.W.N. 24 ; 11 C.W.N. 487. An order in favour of one decree-holder does not enure for the benefit of the other decree-holders who are not parties to the proceedings. 18 A. 413 ; 31 M. 163 ; 13 M. 366 ; 25 M. 721 ; 30 M. 335 F.B. ; 31 A. 514. But see 33 M. 260. An order of the court "not pressed, dismissed" when the claim petition under O. 21, r. 63 was withdrawn is not one under O. 21, r. 63 and is not conclusive subject to a suit within one year. 80 I.C. 233 = 1925 M. 265. An order upon a claim petition which gives no final judgment on the rights of the claimant, but simply orders the sale after notifying the claim is one under these rules against the claimant. 82 I.C. 737. When the objection is withdrawn, the order is not one under O. 21, r. 63 ; 79 I.C. 1002. Where the attachment is withdrawn by the decree-holder, he cannot bring a regular suit for a declaration under O. 21, r. 63. Such a suit lies only when an attachment has been objected to and the objector's claim has been either accepted or disallowed by the executing court. 1926 L. 348. An order of refusal to postpone a sale in order

that the claimant to the attached property may put in the sale deed after having it registered is not one under O. 21, r. 58 and a suit lodged after a year from the date of such order is not barred by limitation. 24 W.R. 75 P.C. Where a Court passed an order of release of attachment with respect to only a portion of the attached property under a misapprehension although the claim was with respect to the whole of the property attached, it was held that the order of the Court allowing the claim with respect to a portion of the claim was under a misapprehension that the order of release meant to allow the whole claim and that the order did not disallow under O. 21, r. 61, any part of the claim nor was it against the claimant with regard to any property comprised in the order. 192 P.R. 1909. If the Court orders the sale of the property subject to the claim of the claimant without defining the respective shares of the judgment-debtor and the claimant, the order is not one under O. 21, r. 63, and the period of one year does not apply in such a case. 27 A. 464. On a claim to a share in the attached property made by an intervenor, it is the duty of the court to define there and then what share was possessed by the debtor and to sell only such share. When the Court fails to do so, but sells the undefined rights and interests of the debtor, there cannot be said to have been any decision under O. 21, r. 63 of the Code, of which the purchaser would take advantage. 4 W.R. 35 ; 6 N.W.P. 185. When certain immoveable property is sold in execution of a mortgage decree passed by a Small Cause Court (it having no jurisdiction to do so) and the objection under r. 58 was disallowed, a suit brought after 12 months to establish the right is not barred as the Small Cause Court had no jurisdiction to pass such a decree, and the Civil Court to which the decree had been transferred had no jurisdiction to allow any sale to take place under it. 15 W.R. 311. An order upon a claim petition which expresses no final judgment on the rights put forward, but simply directs the sale after notifying the claim is an order against the claimant for the purposes of r. 63. 82 I.C. 737 (M.) The finding of the Court that the claimant and the judgment-debtor were in joint possession of the property and the order that the sale should take place with a notification of the claimant's claim respecting it, is not an order under O. 21, r. 63, inasmuch as the order passed on the claim petition and the reasons given for it were not adverse to the claimant. 11 C. L.R. 352. The order contemplated by O. 21, r. 63, must at all events be an order given against one party or the other, and an endorsement of the Court acquiescing in the claimant's request that his application should not be proceeded with cannot be regarded as an order given against the claimant and the limitation of one year does not apply to the case. 5 B. 440. When the Court declines to pass an order under these rules thinking it better that the purchaser should be referred to a separate suit to enforce his purchase, the order is not within the rule. 27 M. 25. An order on a claim petition is final in so far as the rights with respect to the attachment are concerned. (1925) M.W.N. 406=87 I.C. 635.

Conditional Order.—A Court has no jurisdiction to make an order allowing a claim preferred under O. 21, r. 58, conditional on the claimant paying certain sums to the decree-holder, on the ground that in the conveyance by which the claimant purchased the properties, there was an undertaking on his part to pay that sum to the decree-holder as part of the consideration. 44 I.C. 1007.

When an order passed on a claim petition is that the allegation of the plaintiff will be notified to the bidders, the order is one against the claimant and amounts to rejection of his claim. 41 M. 985 ; 2 L.W. 206=27 I.C. 944. Where some of the objectors to a sale of immoveable property in execution of money decree compromised with the decree-holder, who then applied for sale of the properties, the order of the Court falls under r. 63. 8 W.R. 378. Where a claimant establishes his claim to a part of the property attached, so much of it must

be released from attachment. 13 W.R. 63 F.B.. If the Court thinks that the property attached ought not be sold, the proper procedure to be adopted is to release the property from attachment. 8 W.R. 98. On a day fixed for the sale, the mortgagee applied that the sale proceeds be kept in Court deposit to satisfy his claim under the mortgage and not be passed over to the creditor. An order passed on such an application dismissing it, on the ground that as the sale had taken place it had no jurisdiction to hear the petition does not fall under O. 21, r. 63. 70 I.C. 648=1923 M. 96. On a claim petition on the ground that a moiety of the property belonged to the claimant, an order passed to the effect "whatever rights the defendant has, will pass by the sale; the petition does not require any further investigation, the claim put forward by the petition will be noted in the sale proclaimed" is not a proper order under O. 21, r. 62, and is not an order against the claimant to debar a suit by him after one year under Art. 11 of the Limitation Act. 44 M.L.J. 141=72 I.C. 857. Merely because the order disallowing the claim was passed after the sale had been allowed to proceed, it cannot be said that there is no valid order under O. 21, r. 63, 4 B. 23; (not followed in 9 C. 230.) An order on a claim petition declining to investigate for want of jurisdiction is not one under O. 21, r. 63. 41 M.L.J. 198=63 I.C. 431. An order of attachment is valid and a claim dismissed is final, even though there was no attachment, when the claimant (mortgagee) having submitted to the order of the court on claim petition, though under a mistake, could not later urge that the order was without jurisdiction; and the suit after a year is barred under the circumstances. 41 M.L.J. 544=(1921) M. W.N. 764. Where an attachment has been removed by an order of Court, the order is conclusive whether it was *ex parte* or whether the proceedings were irregular. 75 I.C. 728=2 M.L.J. 60.

Delay.—An order dismissing a claim on the ground of delay falls under O. 21, r. 63. 6 N.L.R. 66. An order on a claim petition merely stating that it is too late but it will be notified to the bidders is an order rejecting the claim to which the provisions of r. 63 apply. 1926 M. 593=93 I.C. 335.

Where a person objects to the attachment of the property and files an application asking that his objections be recorded without asking for an investigation of his claim and the Court records his objections, such recording of objections does not amount to an order against the objector to which the provisions of O. 21, r. 63 would apply. (1919) M.W.N. 805=52 I.C. 938. Where there is no finding under O. 21, r. 62 that the property is subject to a mortgage or lien in favour of some person not in possession the order is not under O. 21, r. 63, conclusive between the parties. 1 A.L.J. 531. The order of the Court on an application by the mortgagee of the property attached in the terms that "the mortgage is registered and in the ordinary course should have found a place in the encumbrance certificate. Decree-holder however opposes this petition as it is filed too late. Sale to take place with notice of this mortgage and that decree-holder disputes it" is simply an order of refusal to stop the sale and the Court was bound to investigate the case or refuse to investigate under the proviso of the r. 58, 1926 M. 216=91 I.C. 985.

THE ORDER SHALL BE CONCLUSIVE.—Subject to the result of the suit to establish his claim by the aggrieved party, the order is conclusive and the party against whom an order is made cannot assert his right in any other suit as plaintiff or defendant denied to him by the order. 9 B. 35; 4 M. 302; 22 B. 640; 27 C. 714; 29 M. 225; 101 P.R. 1915; 66 P.R. 1919; 55 I.C. 752; 44 M. 268; 3 M.H.C. 220; 4 B. 611; 1 A. 381 F.B.; 1 A. 541; 2 A. 455; 8 M. 506; 14 B. 372; 18 A. 413; A.W.N. (1883) 19; A.W.N. (1884) 25; A.W.N. (1886) 39; 8 O. C. 306; 1922 C. 164; 80 I. C. 994=17 S.L.R. 63; 1926 M. 593=93 I.C. 335. The unsuccessful claimant can plead in defence that he was in adverse possession at the time of the order against him. 8 M. 506; 10 M. 357. When a claim based on a mortgage is disallowed and also the

suit under O. 21, r. 63, the mortgagee cannot enforce his rights by a regular suit under the mortgage. 44 M. 268. An order releasing the property has not the effect of a general decision that the property does not belong to the judgment-debtor. It has reference only to the claimant. 8 W.R. 27. When the same property is attached in execution of different decrees and all the attachments are removed under O. 21, r. 63, it is not necessary for each attaching creditor to bring a separate suit. If one of the creditors brings a suit against the objector and therein sets up the right of ownership of the original judgment-debtor he effectively gets rid of the claim of his objector and leaves the road for other parties having lien upon the property. 12 W.R. 221. If the defeated claimant fails to bring the suit within the period of one year provided by Art. 11 of the Limitation Act, the order becomes conclusive as regards the parties to the proceedings and the persons claiming title under them. 1 C.L.J. 296; 4 M.H.O. 263. A purchaser from the judgment-debtor cannot take advantage of an order obtained by the judgment-creditor under r. 62 to which he is an entire stranger. 6 W.R. 157. On an objection by a third party being rejected he filed a regular suit to establish his title and obtained a decree, but before the institution of the suit one of the decree-holders had died and his representative was not made a party to the suit. It was held that the legal representative of the deceased decree-holder was not bound by the decree in the suit. 64 I.C. 359; 1925 B. 413=27 Bom. L.R. 931. The provision of O. 21, r. 63, that an order thereunder shall be conclusive, does not take away the right of the party to have the order of dismissal for default set aside. An application to restore the petition dismissed for default is maintainable. 47 M. 651. Where the Court does not sell the property, there is no binding order between the parties. 11 W.R. 134; 16 W.R. 122. A suit need not be brought within a year of the order disallowing the claim when after dismissal of the claim he continued in possession till the execution proceedings were struck off for default and subsequently revived and the property was sold under a second attachment. 14 W.R. 367. The finality and conclusiveness of the order under O. 21, r. 63, passed on a claim preferred to property attached in execution of a decree cannot be affected by the circumstances that owing to the decree being otherwise satisfied after the order, the property attached has not been brought to sale. When under such circumstances, the unsuccessful claimant more than after a year from the order brought a suit against the parties to the decree for the establishment of his proprietary rights to the property attached, the suit is barred by limitation. 1 A. 541; 1 A. 381 F.B. Where a claim under O. 21, r. 58, is dismissed but the property is subsequently released from attachment within the period limited by r. 63 of the order, it is not incumbent on the unsuccessful claimant to institute a suit under r. 63, within a year of the dismissal of the claim. 51 O. 548. If the property is again attached in execution of the same decree, the claimant will be entitled to make a fresh claim and on the failure of such claim he will be entitled to institute a title suit within one year of the date of such failure (*ibid*). When property is attached in execution of a decree and a claim preferred thereto, the object of the claimant is to obtain the removal of the attachment, and when that attachment is removed by the judgment-creditor's own act, there is no longer an attachment which could prejudice the claimant and therefore there is no necessity for the claimant to bring a suit to set aside the order. The order disallowing the claim has no force under the circumstances. 18 B. 241; 31 C. 223; 29 M. 225; (*contra* in 1 C.L.J. 296); 13 B. 72. When the attachment was withdrawn the right of the claimant survives and he has a right to the property which he had acquired after the attachment. It was void as against the attachment only. 8 C. 279. When an order is passed under O. 21, r. 57, striking off an execution application, its effect is to raise the attachment and hence an order of the Court under O. 21, r. 60 or 61 allowing the objection of the claimant is a nullity in the eye of law being unnecessary and redundant. There is no necessity for the decree-holder to bring a suit under O. 21, r. 63. 3 L. 7. A claimant, whose claim under O. 21, r. 58 has been dismissed, (but the attachment was withdrawn

at the instance of another claimant subsequent to the order), is not bound to file a suit to set aside the order against him within one year of the dismissal of his claim petition. It is really the attachment or rather the order upholding the attachment that is the cause of action in such cases. Once the attachment goes, the order dismissing his claim cannot be said to prejudice the claimant if it *ipso facto* bars all operations against him. 22 M.L.T. 496=42 I.C. 693; 26 M.L.T. 499=26 I.C. 532; 87 I.C. 635=1925 M. 1113. As soon as an attachment is withdrawn, there is no longer any attachment or any proceeding in execution in which the order against the unsuccessful claimant would operate to his prejudice as the parties were restored to the position which they occupied before the property was attached. 22 Bom. L.R. 1446=59 I.C. 774; (1923) M.W.N. 54=16 I.C. 529; (*contra* held in 66 P.R. 1916). Where a claimant is unsuccessful under O. 21, r. 58, but gets the property released from attachment by coming to terms with the decree-holder, without notice to the judgment-debtor, a suit subsequently brought by him against the judgment-debtor for recovery of possession is not barred under O. 21, r. 63. 3 O.L.J. 381. Where after the dismissal of a claim petition a suit is filed and withdrawn, it does not bar a fresh objection to a fresh attachment unless the judgment-debtor was a party to the previous objection petition. 8 O. 871. An unsuccessful claimant is not precluded by S. 11 of the Limitation Act from enforcing his mortgage lien more than one year from the date of rejection of his objection. 29 C. 25; (10 C. 1035; 3 C.W.N. 153; 4 C.W.N. 769, relied on). An order under O. 21, r. 62, is, subject to a regular suit under O. 21, r. 63, conclusive and cannot be questioned by an auction-purchaser who simply purchases the right, title and interest of the judgment-debtor. 45 P.L.R. 1919=51 I.C. 100. A judge has no power of trying the same objector's claim under r. 63, a second time as against the same attachment or to reopen a question finally decided on the former occasion. 14 W.R. 144. The auction-purchaser gets a good title as against the claimant unless the order is set aside. 17 O. 280. When an objection under S. 21, r. 58 is allowed and the attached property is sold subject to the objector's mortgage, the decree-holder by becoming an auction-purchaser cannot challenge the mortgage in a subsequent suit by the mortgagee for foreclosure of the mortgage and is bound by the order made in the objection case. 82 I.C. 771. Where the claimant did not file a regular suit to set aside an order disallowing his claim to the property, his written statement in a suit by the plaintiff for the recovery of possession cannot have the effect of a regular suit though it may have been put in within the prescribed period of one year; and the order in the claim petition was held to be conclusive against him. 41 I.C. 684=22 M.L.T. 232; 50 I.C. 959. Where a person claims a right to the possession of the property and fails, a suit after more than a year of the date of the order, for partition which is in substance a suit for possession of the property under the same right, is one barred by Art. 11 of the Limitation Act. 26 B. 146. The execution order is subject to the result of the suit. It is affected by the decree in the suit whatever it may be, either by way of confirmation, modification or reversal. U.B.R. (1892-1896) Vol. II, page 255.

WHAT COURTS CAN HEAR OBJECTIONS.—A Court of Small Causes has no power to order an attachment of immoveable property or to adjudicate on claim proceedings resulting therefrom. 28 O.W.N. 16. When a property is attached in execution by two Courts, the Court attaching first and having the property in possession has power to dispose of claims to it. 19 B. 710.

PECUNIARY JURISDICTION.—Though the value of the property attached may greatly exceed the value of the decree, the executing Court has still to decide the objection. 101 P. R. 1915, (*Contra* in *obiter* in 1926 N. 197=90 I.C. 196; that rights relating to property far beyond the pecuniary jurisdiction of a tribunal in regard to suits cannot be disposed of on the claim petition).

SALE OF PROPERTY ATTACHED AND CLAIMS THERETO.—When the property attached has been sold, the Court cannot entertain an application afterwards under O. 21, r. 58. The Court would be acting in excess of its authority and in violation of the express provisions of the statute in allowing such a claim petition and the order allowing the claim is liable to be set aside on revision. 16 C.W.N. 1029 = 15 I.C. 53. When perishable things, under attachment in respect of which a claim has been preferred, are sold, the claim is not extinguished, but attaches to the sale proceeds. 15 C.W.N. 817 = 8 I.C. 77.

REMEDIES OF THE PERSON WHOSE PROPERTY IS ATTACHED IN EXECUTION OF A DECREE.—(i) He can apply under r. 58 for releasing the property from attachment. (ii) He may bring a regular suit to establish his right to the property in dispute, if the claim is disallowed, under O. 21, r. 63. 4 B. 529 ; 4 M. 131 ; 1925 N. 390 = 8 N.L.J. 73. (iii) If he did not apply under r. 58, he may bring a regular suit within the ordinary period of limitation applicable to a suit to establish his title and to receive possession of the property. 23 B. 266 ; 18 A. 410 ; 4 A.L.J. 574 ; L.B.R. (1893-1900) 234 ; U.B.R. (1897-1901) Vol. II, 267 ; 4 L.B.R. 75 ; 4 L.B.R. 252 ; 3 A. 504 ; 1 C.W.N. 24 ; 13 C.P.L.R. 69 ; 87 P.R. 1904 ; 6 C.L.R. 362. A suit by the rightful owner for wrongful attachment of property which is attached in execution as the property of the judgment-debtor is maintainable against the decree holder, in spite of a subsequent order that the property should not be released and returned to the true owner pending the decision of the suit by the decree-holder that the property is liable to attachment. 60 I.C. 280. (iv). If the claim preferred under O. 21, r. 58 is disallowed, he may pay the decretal amount to the decree-holder and then sue for it as money paid under compulsion of law (i.e., pressure of execution proceedings). 7 C. 648 P.C. ; 15 C. 656 ; 14 B. 299 ; 32 P.W.R. 1911. In such a case the sale of the property is avoided and the attachment comes to an end. Such a suit is in reality a suit for damages and is a suit of small cause nature. 18 W.R. 283. (v) He may not take proceedings at all to set aside attachment. He may pay the amount of the decree under protest and then sue as in (iv) above. 40 C. 598 P.C. ; 32 W.R. 1911 ; 22 B. 473. (vi) A suit by the defeated claimant for return of purchase money is maintainable against the judgment-debtor for failure of consideration and such a suit not being governed by O. 21, r. 63, may be brought after one year from the date of order disallowing the claim. 21 A.L.J. 770 = L.R. 5 A. 28. (vii) If the claim under O. 21, r. 58 is dismissed, a suit for a declaration under the provisions of S. 42 of the Specific Relief Act is not incompetent, for a declaration that the land was ancestral that the plaintiff had built certain houses, that the debt contracted by the judgment-debtor was without consideration and legal necessity and that the houses were exempt from attachment and sale by virtue of S. 60 (1) (a) of the C. P. Code. 52 I. C. 157. (viii) When the claimant first put in a petition and then withdrew it without the permission of the court, he is not debarred from bringing a regular suit for a declaration of his right. 4 L.B.R. 75.

REMEDIES OF THE DECREE-HOLDER—When a judgment-creditor seeking execution is met by a plea that the property attached does not belong to the judgment-debtor, the former is not obliged to take proceedings under O. 21, r. 58, and get an order passed against him. He may at once institute a regular suit for a declaration that the property sought to be taken is the property of the judgment debtor. 4 A.L.J. 574 = A.W.N. (1907) 207 ; 18 A. 400 ; 23 B. 266. Independently of the provisions of O. 21, r. 63, a decree holder may sue for a declaration that certain property attached in execution of his decree belonged to the judgment-debtor, although at the time of the suit the attachment might have been withdrawn and the property might be in the possession of the decree-holder. To such a suit the proviso to S. 42 of the Specific Relief Act does not apply. 45 I.C. 972. When there is no attachment, the

decree-holder has no right to bring a suit under S. 42, Specific Relief Act for a declaration of right of his judgment-debtor. Moreover, under O. 21, r. 63, a suit lies when the claim to the property attached is allowed. 1926 R. 124 = 4 R. 22.

SALE WITHOUT ATTACHMENT—EFFECT ON THE CLAIMANT.—If a Court is invited by the decree-holder to sell property which has not as a matter of fact been duly attached and the Court is apprised of that circumstance by a person claiming to be interested therein, the Court has inherent power to investigate the matter when a sale of immovable property has actually taken place, and its validity is impeached on the ground that it was not attached. The absence of attachment does not of itself vitiate a sale. But the position is different when the objection is taken to the legality of the proceedings before the sale has taken place. The duty of the Court under such circumstances is to ensure compliance with the provisions of the Code when there is still time left for necessary action. 13 O.L.J. 243 = 9 I.C. 918.

SUITS UNDER O. 21, R. 63.

NATURE AND SCOPE OF SUITS.—CLASSES OF SUITS.—There are three possible classes of suits under O. 21, r. 63—(i) when the property attached has been released, a suit by the decree-holder; (ii) when the property attached has not been released, a suit by the claimant against the decree-holder for a declaration that the property is not liable to attachment, the judgment-debtor siding with the objector and not claiming the property as his own; and (iii) when the property is not released, a suit by the objector against the decree-holder, the judgment-debtor resisting the claim and claiming the property as his own and the plaintiff alleging such attitude of the judgment-debtor. 94 P.R. 1909 F.B.; 82 P.R. 1913; 17 A. 69. The object of the suit is to set aside an order passed on a claim in execution proceedings. 8 A. 6 P.C.; 2 I.C. 980 = 6 M.L.T. 154; 35 C. 202 P.C. Suits under O. 21, r. 63, are substantive suits to all intents and purposes and must be tried like any other suits subject to the ordinary procedure and evidence. 12 C. 696 (affirmed in 17 C. 436 P.C.) O. 21, r. 63, is not restricted to the determination of the question whether the property ought to be attached or not. Where a decree-holder who had fraudulently obtained a decree and improperly purchased the property, brings a suit under O. 21, r. 63, the defendant is entitled to set up the plea that the suit from the beginning to the end was a fraud. 17 M. 389; 23 I.C. 755; (10 B. 659, dissented from). The plaintiff cannot ask for a declaration that he has a mortgage lien or charge on such property. 2 I.C. 980 = 6 M.L.T. 154; 35 C. 202 P.C. In a suit under O. 21, r. 63, the question to be decided is that of right or title and not merely that of possession. 11 W.R. 492. Where the object of the suit is to establish that the property mortgaged is not redeemable and is liable to attachment in execution of the plaintiff's decree, the suit must be taken as one falling under O. 21, r. 63. 111 P.R. 1900. A decree holder whose attachment of property has been set aside on a claim petition by a transferee from the judgment-debtor can alone and without suing in a representative character maintain a suit for a declaration that the transfer is in fraud of creditors and void under S. 53, T. P. Act. 43 M. 143; 43 I.C. 960. It is open to an attaching creditor to plead in defence to a suit by the alienee whose claim has been rejected that the alienation is a fraudulent one intended to defeat or delay the alienor's creditor. 43 M. 760 (overruling 41 M. 612, F.B.); 16 N.L.R. 3 = 54 I.C. 798. A suit under O. 21, r. 63 is not a part of execution proceedings. 70 P.R. 1919; see also 16 B. 644. These rules confer a statutory right of suit and the right is not affected by the sale of the property in execution of the decree. 70 I.C. 332 = 1923 P. 154; 7 C. 608. In a suit under O. 21, r. 63, the Court has no power to allow the costs of the claim petition. (1924) M.W.N. 757 = 83 I.C. 89. A suit does not lie to recover costs incurred by a decree-holder in successfully opposing a claim under these rules. 3 M. H.C. 341; 11 I.C. 828. A suit by an unsuccessful claimant to recover costs incurred in the claim proceedings is maintainable when it is shown that the defendant had no

justification for attaching the property. U.B.R. (1904) 1st Qr., O. P. Code, page. 4. A decree-holder after the judgment-debtor's insolvency is not entitled to a decree declaring that the property is liable to attachment, but he is entitled to a decree declaring that the property is that of the judgment-debtor. 31 M. 347; 17 M.L.J. 618. A suit by a reversioner after his claim petition is disallowed to establish his right against the attachment is one under O. 21, r. 63. 32 P.R. 1904. The effect of striking off a suit under O. 21, r. 63, has not the effect of reversing the order releasing the property from attachment. 22 C. 909 P.C. A suit under O. 21, r. 63, is one for setting aside an order under rr. 61 and 62. The rights of the parties are determined as they existed at the time of the attachment and not when the suit was instituted. So a plea of adverse possession at the date of such suit cannot be sustained. 18 B. 260.

CONSEQUENTIAL RELIEF.—In a suit to set aside an order on a claim petition the plaintiff is not confined to the relief which can be given by the Court that heard the claim, but is entitled to ask both for declaration of his title to the property and for all consequential reliefs, e.g., recovery of its value where the property has been sold prior to the order on the claim petition. 40 M. 733 F.B.; 16 B. 608. A suit for a declaration of plaintiff's right to property attached and for possession thereof and also for an injunction restraining the sale thereof in execution is maintainable. 31 C. 511. The proviso to S. 42 of the Specific Relief Act does not take away from a party against whom an order is made under these rules, the special right conferred by O. 21, r. 63, i.e., to sue for a declaration of his title in so far as it is affected by the order which he seeks to impeach. 29 M. 151; 1 L.B.R. 1; 10 B. 610; 4 L.B.R. 88; 4 L.B.R. 263. The proviso to S. 42, Specific Relief Act, has no application to suits instituted under the provisions of r. 63, and hence a suit under the rule by a mortgagee whose objection has been disallowed in execution proceedings could not be dismissed on the ground that the plaintiff being entitled to possession, a merely declaratory suit would not lie. 10 P.R. 1912, (16 M. 140, dissented from). There is nothing in the words of O. 21, r. 63, to limit the party unsuccessful in the attachment proceedings to a suit for a mere declaration that as long as the property is in the custody of the Court and when temporary injunction staying proceedings has been granted, the Court will act on a new declaration and itself grant the consequential relief. But when the property is released or sold and comes into the possession of private individuals, a suit for a mere declaration with a consequential relief is one brought in contravention of S. 42 of the Specific Relief Act. 1 O.C. 272.

CAUSE OF ACTION.—Essential conditions for a suit under O. 21, r. 63 are—(a) making of an attachment of some property; (b) objection being taken to such attachment; (c) investigation being made into such objection in the manner prescribed; and (d) the objection being allowed or disallowed. 10 A. 479. The dismissal of a second claim by the same party consequent on a subsequent attachment gives a fresh cause of action. 87 I.C. 756 = 1925 C. 1147; 42 I.C. 683. The cause of action for a suit under O. 21, r. 63, is the making of the order. 27 M. 94; 2 I.C. 980 = 6 M.L.T. 154; 35 C. 202 P.C. When the claim was disallowed and before the institution of the suit the attachment was at an end, as the decree had been satisfied, the plaintiff has a good cause of action in order to remove the doubt thrown upon his title. 9 C. 10. When the objection of the claimant was disallowed and he paid the amount for the judgment-debtor into Court and the property was released from attachment, there is no cause of action for the claimant to bring a suit for a declaration of his title under O. 21, r. 63. A.W.N. (1889) 14. To justify a suit under O. 21, r. 63, for a declaration of title the hostile act of the defendant must be antecedent to the filing of the plaint.

Insolvency of the judgment-debtor.—Where pending a suit under O. 21, r. 63, one of the judgment-debtors was declared an insolvent and the plaintiff claimant scheduled

his decree as a claim under the Insolvency Act, *held* that it had not the effect of superceding the decree or of creating another decretal right in addition to it or independently of it and it did not prevent the maintainability of the suit which was founded upon a third and different cause of action and against persons who were not parties to it (purchasers in execution of a money decree.) 10 A. 194.

COURTS THAT CAN TAKE COGNIZANCE OF THE SUIT.—A suit for moveables under O. 21, r. 63, is not merely a declaratory suit and is cognizable by a Court of Small Causes. 39 M. 219; 23 B. 266; 3 B. 179; 6 A. 10; 7 O. 609; 21 O. 430; 2 B. 365. Where the suit is by the decree-holder to establish his right to attach certain property as being the property of his judgment-debtor and not of the claimant whose claim has been accepted, it is not cognizable by a Court of Small Causes, but the claimant whose claim has been rejected can bring a suit in the Small Cause Court for the recovery of the moveable property. 84 P.R. 1870=8 O.C. 281. A Mofussil Court of Small Causes has jurisdiction to take cognizance of a suit to recover possession of moveable property under Rs. 500 in value attached under the rules. 2 B. 365.

NATURE AND BURDEN OF PROOF.—Where a claim was rejected and the claimant brought a suit under O. 21, r. 63, and proved his possession, but failed to prove the title alleged by him, it was *held* that such possession having been proved, it lay upon the defendant to prove a title to the property in himself or in the judgment-debtor and in the absence of such proof, the claimant was entitled to a declaration of his right to the property as against the defendant. The possession of the plaintiff itself affords ground for an inference of proprietorship for the purposes of the suit except so far as the right of the judgment-debtor can be shown affirmatively to contradict or qualify it. 6 B. 215 F.B. See also 1 Bom. L.R. 45=1 S.L.R. 107 (dissented from in 17 C. 266). Where on the dispossession of one share-holder by another of a certain Jalkar in execution of his decree, the dispossessed share-holder sued for establishing his right and for recovery of possession alleging that the Jalkar was left *ijamala* and the decree-holder set up that the Jalkar had been formed after the partition and by delivery of one of his own villages, *held* that the burden lay on the claimant to prove his case. 3 B.L.R. App. In a suit under O. 21, r. 63, the plaintiff must establish a *prima facie* case of possession whereupon the claimant must make out if possible a better title. 10 C. 50. The decree-holder plaintiff need only prove that on the date of the attachment his judgment-debtor had a subsisting right to the property. 35 B. 79; 14 I.C. 813=5 Bur. L.T. 47. In a suit under O. 21, r. 63, the burden of proof lies on the plaintiff to show that the adjudication in the objection proceedings was wrong. 55 I.O. 752; 24 N.L.R. 87; 10 Bur. L.T. 238=37 I.C. 767; 41 M. 205; 22 C.L.J. 380=13 I.C. 455. The burden of proving consideration rests on the plaintiffs; then the question of possession is to be proved by him. If these two points are found in favour of the plaintiff, the onus of proving good faith still rests on the plaintiff. 1926 N. 293=92 I.C. 810.

Bona fides of the transaction.—When a claim is rejected the onus to establish that the transaction, on which the suit is based was *bona fides* and for good consideration lies on the plaintiff. 78 I.C. 887; 35 I.C. 427=19 O.C. 64; 2 N.L.R. 87; 11 W.R. 422. A decree-holder whose attachment of property has been set aside on a claim petition by a transferee from the judgment-debtor can alone, and without suing in a representative character maintain a suit for a declaration that the transfer is in fraud of creditors and void under S. 59, T.P. Act. 43 M. 143; 43 I.O. 960. It is open to an attaching decree-holder to plead in defence to a suit by the alienee whose claim has been rejected that the alienation is a fraudulent one intended to defeat or delay the alienor's creditors. 43 M. 760 (overruling 41 M. 612 F.B.); 16 N.L.R. 30=54 I.O. 798. In a suit by an unsuccessful claimant the plaintiff must give *prima facie* evidence that the document represents a *bona fide* transaction, because he has to get

rid of the order which has been passed against him. 2 I.C. 258=12 O.C. 74. The purchaser plaintiff is bound to prove purchase and possession of the property. 25 W.R. 79. It is for the plaintiff in a suit under O. 21, r. 63, to set aside an attachment to show that a deed of sale has been executed in his favour by the judgment-debtor and that consideration money has passed and possession has been given. The onus then is on the defendant if he alleges collusive sale. 15 W.R. 155. It is sufficient for the plaintiff to make out a *prima facie* case where his case is based on a gift and other titles originating from the judgment-debtor, and leave it to the defendant to demonstrate the fraudulent nature of the transaction relied on. The plaintiff must satisfy the Court that there was a genuine *bona fide* transfer of the property in dispute from the debtor to the ostensible owner. 11 W.R. 454. In a suit by a defeated claimant under O. 21, r. 63, claiming under a transfer from the judgment-debtor, the ordinary method of establishing the *bona fides* of the transfer is to prove that the consideration passed and that possession was actually transferred and this being done, the onus would be shifted on to the contesting party to show that there was nevertheless an intention to defeat creditors. 55 I.C. 72; 33 I.C. 892; 53 I.C. 205. The plaintiff had filed objections to the attachment of certain property on the basis of a sale-deed. The objection was disallowed. He then brought a suit under O. 21, r. 63, and it was *held* that the onus lay on the plaintiff to prove that the deed he relied on was not collusive and fraudulent. 47 P.L.R. 1919=50 I.C. 884. Where a claim to attached property has been disposed of not on merits but on the ground of the application having been made too late, the burden of proof in a suit by the defeated claimant for a cancellation of sale and declaration of his title, of proving *mala fides*, and absence of consideration lies on the person who seeks to resist the plaintiff's claim. 13 C.P.L.R. 69. Where an objection is disallowed the plaintiff is bound to lay some evidence to satisfy the court that the document under which he claims represents a *bona fide* and genuine transaction and the burden does not lie on the defendant in the first instance to give evidence of fraudulent and collusive nature of such a document. 5 A.L.J. 358; 30 A. 321; 67 I.C. 876=3 L. L.J. 198; 12 O.C. 74; 55 I.C. 72; 41 M. 205; 35 I.C. 427=19 O.C. 64; 78 I.C. 887; 53 I.C. 205; A.W.N. (1887) 71; 37 I.C. 767; A.W.N. (1899) 220; 18 A. 369; 12 B. 270; 9 C.P.L.R. 142; 22 O.L.J. 27; 47 M.L.J. 14; 13 I.C. 455; 14 I.C. 813; 55 I.C. 752; 4 L.B.R. 229; 77 I.C. 50=1923 N. 334. In a suit by a defeated claimant the burden of proof that the sale in favour of the daughter (claimant) was genuine and supported by consideration and that the property belonged to the plaintiff and that it was in her possession at the time of the attachment lies upon her. 4 L.B.R. 228. See also 12 B. 270; 30 A. 321; 6 C.P.L.R. 81. It is for the plaintiff to prove that there has been a real and *bona fide* transaction. It is not sufficient merely to prove that there has been a registration of sale or mortgage. L.B.R. (1893-1900) 333. The onus of establishing that the transaction on which the suit is based was entered in good faith lies on the plaintiff. 1923 Rang. 334. The Court may presume that the alienation is fraudulent when it finds that there must have been a fraudulent object of defeating or delaying the creditors under S. 53 of the T. P. Act. 3 L. L.J. 198. The plaintiff must give a *prima facie* evidence of the genuineness of the transaction in his favour. Once he has shown the *prima facie* title the onus is shifted to the defendant to prove the fraudulent and unreal nature of the transfer. 89 I.C. 953=1 Lab. Cas. 274=1926 L. 25. In such suits a Judge is bound to find the facts on the evidence tendered and taken in the regular suit and not upon any evidence taken in the summary case. 23 I.C. 676. But the evidence taken in the summary proceedings may be admissible on certain conditions under S. 33 or 144 of the Indian Evidence Act. 19 O.L.J. 358=22 I.C. 946. It is open to the judgment-debtor to bring a suit of the nature contemplated in O. 21, r. 63 and it is not necessary for him to include a prayer for possession in his plaint. 16 M.L.T. 300=25 I.C. 700; 15 O. 674. On a claim being denied, satisfactory proof is required for its genuineness and the ordinary test of evidence cannot be dispensed with

because the parties have had certain business relations. U.B.R. (1892—1896), Vol. II, page. 230. In a suit to set aside a summary order passed under O. 21, rr. 58—63, on the allegation that the order was illegal, it is for the plaintiff to prove its illegality. It is for the plaintiff to make out that the title is really and substantially what it purported to be on the face of the deed, when an objection is raised as to the *bona fides* of the transfer. 11 W.R. 422. When an unsuccessful claimant under O. 21, r. 58, brings a suit under O. 21, r. 63 for adjudication of title and confirmation of alleged possession, the burden is on the plaintiff at first and the question of possession at the date of attachment is an important one. 15 W.R. 202. The plaintiff must prove his title and possession. The burden of proof lies on him. 7 N.W.P. 85; 12 B. 270; 30 A. 321; 4 L.B.R. 928; 18 A. 369; 5 B.H.O. A.C. 76; 11 W.R. 422; 25 W.R. 79. The burden rests on the plaintiff to establish by clear and satisfactory proof that the property attached was his at the date of attachment and not that of the judgment-debtor. A.W.N. (1887) 71. The plaintiff decree-holder is to prove only that his judgment-debtor had subsisting right at the date of attachment. 8 I.C. 639 = 12 Bom. L.R. 956. The plaintiff in a suit under O. 21, r. 63 is neither in a better nor in a worse position than he was as a claimant in the summary proceeding. It is sufficient for him to adduce evidence of possession or title. If he shows that he is in possession the burden is thrown on the defendant under S. 110 of the Evidence Act. U.B.R. (1905), O.P. Code 16. The burden of proof lies on the plaintiff to establish that he is not only in possession, but that he was not the judgment-debtor's trustee. U.B.R. (1897—1901) Vol. 2, page 270. When the claim is dismissed, the burden of proof is on the plaintiff, but this rule does not apply where there is no decision against him. 60 I.O. 751 (L.) It is for the plaintiff to show that his judgment-debtor had been in possession for some period within 12 years preceeding the suit. A.W.N. (1893) 60. A decree-holder attached in the execution of his decree certain properties standing in the name of the wife of the judgment-debtor and certain other person. It was held in a suit under O. 21, r. 63 that under S. 106 of the Evidence Act, the onus lay on the plaintiff (the other person) to show that the purchase money was supplied by the wife the first plaintiff and that the properties had been in the enjoyment of the plaintiff, as these were matters peculiarly within the knowledge of the plaintiff, and if they failed to discharge the onus, it should be taken that the purchase money was supplied by the husband and that the properties had all along been in his enjoyment. 17 M.L.J. 339. Burden of proof in a suit under O. 21, r. 63 lies on the plaintiff. 30 A. 321.

PARTIES TO THE SUIT.—In a suit under O. 21, r. 63, the judgment-creditor, the claimant and the judgment-debtor are the only proper parties. 1 I.O. 428. The other creditors of the judgment-debtor need not necessarily be added, (*ibid*). In a suit under O. 21, r. 63, the judgment-debtor is a necessary party. A.W.N. (1901) 14. When an objection to attachment of property was allowed at the instance of the sons of a Hindu father, a suit for a declaration of title lies against all the sons of the family. 9 O. 888. When a claim has been rejected and the properties have been sold to a stranger the decree-holder is not a necessary party to the suit by the claimant, 70 I.O. 168 = 32 M.L.T. 124; 16 L.W. 330 = (1922) M.W.N. 674.

WHO CAN BRING A SUIT.—The plaintiff though a benamidar is entitled to sue as the person against whom the order was made and the real claimant may be made a plaintiff after the limitation of one year. 8 I.O. 364; (33 C. 1015 and 10 O.W.N. 904, followed). The right of suit conferred by O. 21, r. 63 is not a personal right. A purchaser of the property from the unsuccessful claimant can bring such a suit. 26 A. 89. Where the claim of a Uralan was allowed under the rules, a suit for a declaration by the other three Uralans of the Malabar devaswam against whom a decree was passed declaring its property liable for the amount of the decree thereunder lies. 16 M. 449. A decree-holder has a statutory right to sue under O. 21, r. 63 in his personal

capacity as a decree-holder, respecting merely his own right to have the property attached under his decree. He is not obliged to take the general ground that as against all the other creditors and all other persons a mortgage or sale is to be void. 71 I.O. 20.

LIMITATION FOR SUITS.—The period of limitation for suits under O. 21, r. 63 is one year from the date of the order as provided by Art. 11 of the Limitation Act, 1908. 40 M. 738 ; 22 B. 640 ; 1 C.P.L.R. 30 ; 7 C. 608 ; 21 W.R. 133 ; 24 C. 563 ; 27 C. 714.

Consent order.—The order to which Art. 11 applies must be an order passed as a result of an investigation of the claim. The article has no application to a consent order made without investigation of the claim. Therefore a suit to set aside such an order is not governed by the period of limitation provided by the article. 50 I.O. 649 ; 44 I.O. 528. The period of limitation provided in O. 21, r. 63 is applicable only to a case in which the procedure prescribed by that section has been adopted. 3 M.H.C. 139 ; 21 W.R. 133.

Minor plaintiff.—When an order under O. 21, r. 63 is made against a minor, a suit in respect of that order ought to be filed within one year of his attaining majority under Art. 11 of the Limitation Act. If such a suit is filed within one year from the date of the order by the minor's grand-mother and it is dismissed, this cannot extend the period of limitation. 80 I.O. 992. An order passed under O. 21, r. 63 rejecting the application of the guardian of a minor claimant can be set aside by the minor after he attains majority. 3 W.R. 8 ; 7 C. 137. In calculating the period of limitation allowed for bringing a suit under O. 21, r. 63 the day on which the judgment was pronounced must be excluded. W.R. 1864, 321. If there is any difference of time between the actual drafting of the order and the signing of it, then the latter date must be held as the date of the order when the limitation would begin to run. 10 B.H.C. 19.

Extension of time under S. 14 of the Limitation Act.—When an unsuccessful claimant after spending time to prefer an illegal appeal subsequently dismissed institutes a regular suit to establish his title as provided in O. 21, r. 63, held that he cannot under S. 14 of the Limitation Act deduct from the period of limitation the time during which the proceedings in appeal were pending. W.R. 1864, 371.

COURT FEES.—The Court-fee payable in a suit under O. 21, r. 63, is only ten Rupees. 51 P.R. 1897 ; 111 P.R. 1900 ; 35 C. 202 P.C. ; 22 I.O. 678 ; 19 C.L.J. 358—22 I.O. 946 ; 1 L.B.R. 1 ; 10 B. 610 ; 9 B. 20 ; 15 C. 104 ; 64 I.C. 49 (C.) ; 4 B. 528 ; 4 B. 515 ; 4 B. 535 ; L.B.R. (1893-1900) 139 ; U.B.R. (1897-1901), Vol. II, page 356 ; under Art. 17, Sch. II of the Court Fees Act. Where the plaintiff asked that the suit property be declared as the joint ancestral property of the plaintiff it was held that only one declaration was asked for without consequential relief and a Court-fee of Rs. 10 was sufficient. 13 A. 389 ; 16 A. 308. When a plaintiff asks for a declaration of his title to the property under attachment as against the judgment-debtor and also against the decree-holder for a declaration in denial of the latter's right to bring that property to sale in execution of his decree, there are two substantial declarations asked for and the suit cannot be entertained on payment of Court-fees in respect of only one declaration. When however the judgment-debtor is the sole defendant the claim must be regarded as for only one declaration. 16 A. 308 F.B. ; 18 A. 459. A suit brought under O. 21, r. 63, for setting aside a summary order of the Court passed under O. 21, r. 61, even though the plaintiff may pray in such a suit to be awarded possession of the property is still to be treated as one falling under Art. 17 (1) of Sch. II of the Court Fees Act and chargeable with a ten-rupee stamp. 9 B. 20 ; 31 B. 73 ; 35 C. 202 P.C. ; L.B.R. (1893-1900) 139. A suit for a declaration as well as for possession or injunction to restrain from sale in execution requires an *ad valorem* Court-fee. 31 C. 511 ; 2 W.R. 422 ; 13 C. 162 ; 15 C. 104 ; 19 W.R. 17.

VALUE OF SUIT FOR PURPOSES OF JURISDICTION.—Where property attached has been released the value of suit by the decree-holder is the decretal amount. 253 P.L.R. 1914=25 I.C. 180 ; 40 A. 505 ; 94 P.R. 1909 F.B. ; 82 P.R. 1913 ; 17 A. 69. The jurisdiction of the Court is determined with reference to the amount which is in dispute the amount which the execution creditor will recover if he is successful, and not the value of the property attached unless the three amounts happen to be identical. 15 C. 104 ; 12 A. 698 ; 2 A. 799 ; 4 M. 339 ; 4 B. 515 ; 15 P.R. 1890 ; 1 L.B.R. 1 ; 42 P.R. 1901 ; 15 C.P.L.R. 161 ; 31 O. 511 ; 55 P.R. 1906 ; 11 A. 799. The fact that the value of the property is entered in the plaint as the value for jurisdiction does not affect the question of jurisdiction. 55 P.R. 1906 ; 11 A. 799. Where the property attached has not been released the value of suit, by a claimant against the decree-holder for a declaration that the property is not liable to attachment, the judgment-debtor siding with the objector and not claiming the property as his own, is the value of the property. 94 P.R. 1908 ; 82 P.R. 1913 ; 17 A. 69, 30 M. 335 ; 2 N.L.R. 87. When the amount of the decree is less than the value of the property the former is the proper value. 17 A. 69 ; 38 A. 72 ; 2 I.C. 621=5 L.B.R. 23 ; 55 P.R. 1906 ; 11 A. 799. Where the property is not released, in a suit by the claimant against the decree-holder, the judgment-debtor resisting the suit and claiming the property as his own and the plaintiff alleging such attitude of the judgment-debtor, the value of the property is the value for purposes of jurisdiction. 94 P.R. 1908 F.B. ; 82 P.R. 1913 ; 17 A. 69 ; U.B.R. (1902=1903) Vol. II, C.P. Code 19. The general rule applicable to a suit in which the sole question to be determined is whether the property attached is or is not liable to be attached and sold in execution of a decree is, that where the amount of the decree exceeds the value of the property sought to be sold the latter is the value of the suit ; but where the value of the property attached exceeds the amount sought to be realised the value of the suit is the value of the so much of the property sought to be sold as will on sale satisfy the amount sought to be realised by sale of such property. 27 A. 440.

APPEAL.—No appeal lies from an order passed under these rules, when the claimant is not a party to the suit. 28 B. 459=1 O.C. Sup. 11 ; 15 W.R. 163 ; 2 A. 752 ; 15 W.R. 339 ; 12 W.R. 333 ; A.W.N. (1889) 77 ; 2 Bom. L.R. 241 ; 6 W.R. 21 ; A.W.N. (1883) 178 ; 8 C.P.L.R. 67 ; 6 Bom. L.R. 462 ; 6 C.W.N. 69 ; 5 W.R. Mis. 28 ; 31 I.C. 393 ; 38 A. 537 ; 10 W.R. 21. An order on an objection of the judgment-debtor that the property attached is "waki" property and not liable to attachment, is not appealable under S. 47. 67 I.C. 438=1922 P. 196 ; 39 O. 298 ; 42 O. 440.

REVISION.—Where the Court below has refused to go into the question of possession (the one question it was competent to determine) and has determined the question it was not competent to determine (the question of title) the High Court will interfere in revision and set aside the order purporting to be made under O. 21, r. 61. 24 I.C. 62 ; 28 M.L.J. 327 ; 21 L.W. 230 ; 87 I.C. 189=1925 M. 588. Revision lies where a Court goes beyond the rules and does not make an investigation accordingly, though the claimant has a remedy open to him by way of a suit. 1 L.B.R. 80 ; 1923 R. 195=2 Bur. L.J. 134. No revision lies from an order under these rules. 38 I.C. 299. Where a Court subordinate to the High Court passed a decision without authority the High Court had power to interfere with the decision and was not prevented by the provisions of S. 15 of the Charter Act from so interfering. 18 W.R. 402. It is only in cases where there is no remedy that the High Court ought to interfere under the special provisions of the Charter Act, and not where the complainant has a remedy by way of a regular suit. 20 W.R. 202 ; see also, 1 A. 101. As a general rule the Court cannot interfere in revision when other remedies by way of suit or otherwise are open to the applicant. 3 I.C. 780=11 Bom. L.R. 754 ; 74 I.C. 546=1923 O. 208 ; 1923 R. 195=2 Bur. L.J. 134. The High Court will not interfere in revision against

an order passed under O. 21, r. 61. 8 M. 484; 15 A. 405. Where the Court dismissed the claim but held that the claimant had some interest but not the entire interest, there was no finding what the nature of the interest was, nor a finding as to the person entitled to possession. The order was held to be illegal and set aside in revision. 60 I.O. 616 (Pat.) Where a Court, upon an erroneous view of the scope of the r. 58, applied it to a case to which it had no application, it amounted to acting without jurisdiction, and the High Court would interfere in such a case. 1926 N. 257=92 I.C. 40; (1922 N. 115 not followed).

TEST WHETHER S. 47, OR O. 21, r. 63 IS APPLICABLE TO AN ORDER.—The question whether an order is governed by O. 21, r. 63 or not and whether it is final or not depends upon the allegations put in the claim petition, and not on what the Court finds in its order to be the real state of facts. 21 I.C. 748. Where the claimants allege in their petition that they are trustees for the creditors of the judgment-debtors, a finding by the Court that they are trustees for the judgment-debtor himself, and an order based thereon will not make the order passed on a petition under O. 21, r. 58 so as to make the provisions of O. 21, r. 63 as to the finality of the order applicable to it. On the contrary if the allegations in the petition are such as on their face to show that the claimant is a trustee for the judgment-debtor, he cannot, by calling his petition one under O. 21, r. 58 make the order passed thereon any the less appealable under S. 47 of the Code. 21 I.C. 748. For other rulings see Chap. IX.

VIII.—EFFECT OF ATTACHMENT.

ATTACHMENT CREATES NO CHARGE OR LIEN UPON THE ATTACHED PROPERTY. 5 C. 202; 31 I.C. 664=19 C.W.N. 1159; 34 I.C. 953=21 C.W.N. 1158; 37 I.C. 348. The attaching creditor is not a secured creditor. 26 M. 673; 42 C. 72 P.O. An attachment creates no charge on the attached property and confers no title on the attaching creditor, but merely prevents alienation of the property. 3 L. 414; 25 C. 179 P.C.; 42 C. 72; 28 I.C. 901; 29 C. 428; 26 M. 673; 38 M. 221; 3 B. 58; 1 Bom. L.R. 154; 5 C. 148 P.C.; 25 C. 179; 29 B. 405; 6 P.L.R. 1909; 5 C.L.R. 80; 7 O.C. 314; 11 P.R. 1906; 32 M. 429; 11 W.R. 149; 13 C. 262; 15 W.R. 158; 31 I.C. 664=19 C.W.N. 1159. An attachment in execution is only meant to prevent private alienation and does not create any charge in favour of the decree-holder. 44 M. 232. The only interest which the creditor has in the attached property of his debtor is his right to satisfy himself out of that property. 16 C.W.N. 717=14 I.C. 715. An attaching creditor cannot impeach a subsequent decree as bad in law. 23 A. 347. The right of the attaching creditor is subject to a mortgage already created on the property. 1 A. 333 F. B.; 23 W.R. 373. There is no prohibition in law against an application asking for an order in execution directing the recovery by means of an existing attachment of a further sum which has become due under the decree in addition to the sum for which execution was originally sought. 19 M.L.T. 145=18 I.C. 691. An attachment made before a decree obtained in an administration suit has no priority. 15 C. 202. It does not confer any priority upon the first attaching creditor. 38 M. 221; 38 M. 429.

ATTACHMENT AND WINDING UP ORDER.—The property, of a limited liability company, which is attached before its liquidation does not vest in the liquidator, although in a similar case of an insolvent the property vests in the Receiver. 43 C. 586.

ATTACHMENT AND INSOLVENCY.—Where an execution has proceeded further than attachment and the judgment-creditor has realised assets by sale or otherwise and the proceeds of the sale have been paid into Court before any adjudication order has been passed on the insolvency application of the judgment-debtor, the execution creditor is entitled to the money in preference to the *interim* receiver. 15 I.C. 950; 32 I.C. 190; 29

B. 405 ; 44 C. 1016 ; 11 I.C. 433 ; 29 O. 928 ; 41 A. 274 ; 42 O. 72 P.C. ; 40 A. 86 ; 42 I.C. 9 ; 93 P.R. 1882 ; (29 B. 405 ; 7 Bom. L.R. 488 ; 29 W.R. 575, relied on). Where an order for sale of the attached property in execution is made by the Court, and thereafter, but before the property is actually sold, the judgment-debtor is adjudged an insolvent, the Receiver's title will prevail. 29 O. 428 F.B. ; 10 W.R. 353 ; 15 O. 202 ; 1 N.W.P. 172 ; 26 M. 673 ; 29 B. 405 ; 30 A. 486 ; 44 C. 1016 ; 42 O. 72 P.C. ; 40 O. 78 ; 93 P.R. 1882 ; 40 A. 197 ; 40 A. 86 ; 41 A. 274. Where property is attached before judgment, but, before the decree in the suit, the defendant is adjudged an insolvent, the property attached will pass to the Receiver. 10 W.R. 353 ; 2 Bom. H.O.R. 142 ; 12 B.L.R. 1 App. ; 10 C. 150 F.B. ; 7 O. 213 ; 8 M. 554 ; 26 M. 673 ; 29 B. 405 ; 93 P.R. 1882 ; 20 B. 403.

The attaching creditor has a right to have the attached property in the custody of the Court for the satisfaction of his debt and any unlawful interference with that right constitutes an actionable wrong and a suit will lie at the instance of the attaching creditor for damages against any tort-feaser. 30 M. 413 ; 26 M. 494 ; 8 C.L.J. 20 ; 32 M. 429.

The amount of damages will depend upon evidence, but cannot exceed the value of the property attached. 30 M. 413.

An attaching creditor may redeem a prior mortgage on the property (S. 90, T. P. Act) (*contra* in 6 C. 663 and 14 M. 491. He has not as such any right to redeem a mortgage subsisting prior to the attachment). An attaching creditor's right to redeem the mortgage comes to an end on the sale of the property. 44 M. 232.

He may oppose the probate of a debtor's will if the probate has been obtained in fraud of creditors. 28 C. 441.

ATTACHMENT OF A STRANGERS' PROPERTY.—The attachment of property which does not belong to the judgment-debtor, does not prevent the rightful owner from selling it. 139 P.R. 1893.

ATTACHMENT AND ADVERSE POSSESSION.—An attachment does not confer any interest in the property and does not disturb the continuance of possession of the holder at the time. Hence it does not affect the continuity of adverse possession. 1926 M. 42=90 I.C. 1037 ; 11 M.L.J. 344.

PRIVATE ALIENATION OF PROPERTY AFTER ATTACHMENT TO BE VOID.—Where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor, of any debt, dividend or other monies contrary to such attachment shall be void as against all claims enforceable under the attachment.

Explanation.—For the purposes of this section, claims enforceable under an attachment include claims for the rateable distribution of assets. (S. 64.)

LEGAL CHANGES.—The present section differs from the corresponding S. 276, C. P. Code of 1882 in the following particulars.—(i) The explanation is new ; (ii) The words "during the continuance of the attachment" have been omitted and the word

"contrary to such attachment" have been substituted. It gives effect to the P. C. ruling in 29 O. 154. (iii) The words "by actual seizure or by written order duly intimated and made known in manner aforesaid" coming after the words "where an attachment has been made" have been omitted in the present section as a surplusage. The omission does not make any change in the existing law. 42 M. 844; 39 I.O. 857.

OBJECT AND SCOPE.—The object of the section is to prevent fraud on decree-holders. 30 B. 337; 23 C.L.J. 115; 20 A. 421; A.W.N. (1887) 37; 33 I.O. 492; and to secure intact the rights of the attaching creditors against the attached property by prohibiting private alienations pending attachment. 29 O. 154 P.C.; 52 P.L.R. 1908; 33 I.O. 492. S. 64 contemplates alienations by the judgment-debtor pending attachment, and not by a successful claimant after the date of the claim order and before the institution of a suit under O. 21, r. 63. 38 M. 535. The object of S. 64 is clearly to protect fraud on decree-holders and to secure intact the right of attaching creditors as well as of creditors who have obtained their decrees and are entitled to satisfaction out of the assets of the judgment-debtor. 33 I.O. 492; 34 I.O. 953=21 C.W.N. 158. The section is for the benefit of an attaching creditor, and not for the benefit of those creditors whose attachment is laid later than the private alienation. 11 Bom. H.C.R. 159. The underlying object of the explanation to the section is to secure to the prior attaching creditor full payment of his decretal debt before the private transferee could claim any interest in the attached property or its sale proceeds. 1926 B. 177.

PRIVATE TRANSFERS.—A private transfer includes a sale, a mortgage, a *sur-i-pashgi* lease, an agricultural lease or a temporary alienation even though it is not unfavourable to the decree-holder. 4 A. 219 F.B.; 20 I.O. 241; 7 W.R. 510; 9 W.R. 307; 8 M.L.T. 197; 9 W.R. 544; 4 C.P.L.R. 69; 12 C.W.N. (a case of easement). 8 O. 295 (a case of lease). 18 A. 123 (a case of *sur-i-pashgi* lease). Leases granted by the judgment-debtor are private alienations. 18 A. 123; 20 A. 349. The renewal of previous mortgage is not a private transfer. 4 M. 417; 20 A.W.N. 155; 29 C. 154. But if the amount secured by the renewed mortgage or by the assignment exceeds the amount due on the mortgage at the date of the attachment, the new security will to that extent be void. 29 C. 154 P.C. A transfer according to an award through the court is not a private transfer. 4 A. 219. Sales in execution of decrees and compulsory sales under the Land Alienation Act (Punjab) are not private transfers. A vesting order in insolvency is not a private transfer. 8 M. 554; 10 C. 150; 12 W.R. 103; 2 B.H.C. 150; 1 N.W.P. 81; 7 C. 213; 26 M. 673; 8 B.H. C. O.C. 140; 29 B. 405; 17 W.R. 234; 5 B.L.R. 591; 29 C. 428 F.B.; 1 N.W.P. 10; 7 C. 213; 21 B. 205; 31 A. 628; 6 P.L.R. 1909; 10 W.R. 353. In 20 B. 403 an attachment before judgment was held voidable on account of subsequent vesting order. When an insolvency petition is dismissed an attachment during such proceedings is not void, at least from the date of the order of discharge, if not from the date of its issue. 20 M. 452; 27 M. 7. The mutation of the property, standing in the name of the *Gaddinashin*, in the name of the shrine cannot defeat an attachment. 4 L.L.J. 49=1921 L. 147. Where pending an attachment of property of the judgment-debtor certain disputes between the judgment-debtor and another creditor were referred to arbitration and a decree was passed in terms of the award whereby a mortgage charge in favour of the creditor was created, the decree embodying the award was not a private transfer within S. 64 of the Code. (1921) M.W.N. 808=41 M.L.J. 557. Where subsequent to the passing of an award directing the execution of a deed of conveyance of certain immoveable property, such property is attached in execution of a decree, the execution of the conveyance in pursuance of the decretal order passed by the Court in accordance with the award subsequent to the attachment is not a private alienation of such property which would be void as against a claim enforceable under the attachment. 4 A. 219 F.B. (N.W.P.

1869 page 81 approved); A.W.N. (1881) 75. The easement of light and air falls within the definition of immoveable property. If an easement enjoyed by the dominant tenement is expressly released after the latter is attached under a decree it is an alienation of a portion of that property and the transaction is void. 35 O. 889. A transfer by operation of law is not a private transfer. 23 A. 467; 42 O. 72 P.O. The life interest of a Hindu widow in the immoveable property of her husband, assigned after attachment is void. 23 B. 1. Purchase of a tenant's interest by a landlord for arrears of rent pending attachment is void as against the claims of an attaching creditor. 8 M. 573. Surrender of a holding when it is transferable is private alienation. 8 I.O. 76. When during the pendency of an attachment on a property of the judgment-debtor, it is awarded to another person by arbitration, the award is not a private transfer under S. 64. 35 M.L.J. 441=48 I.O. 123. A private transfer under O. 21, r. 83 is not such a transfer as is contemplated by S. 64. 30 B. 337; 14 M. 227; 1 N.W.P. 114; 11 B. 285 F.B.

THERE MUST BE A VALID ATTACHMENT.—No attachment can be regarded as complete so as to render alienations effected during the continuance of the attachment void against all claims enforceable thereunder unless the attachment is duly intimated and made known under O. 21, r. 54. As between the decree-holder and auction-purchasers the failure to issue such a notice may or may not be an irregularity, but as between the decree-holder and the auction-purchaser on the one hand and an alienee on the other, different equities come into operation if no order is issued to the judgment-debtor prohibiting him from transferring the property. 36 I.O. 732=3 O.L.J. 422; 8 I.O. 857; 13 W.R. 136; A.W.N. (1881) 158; 9 O.W.N. 693; A.W.N. (1881) 65; 1 S.L.R. 76; 2 A. 58; 3 A. 498; 13 A. 119; 2 Agra 206; 7 A. 202; 7 A. 731; 34 I.O. 34; 9 L.W. 18. An order of attachment of property takes effect only from the date of its actual promulgation and not from the date of the court's order. 32 I.O. 276 (on appeal see 39 I.O. 857; 42 M. 844 F.B.; 42 M. 565; 26 I.C. 204; 26 P.L.R. 726=7 L.L.J. 501). The section refers to attachment of property of the judgment-debtor only. Otherwise the attaching creditor has no claim against it. 139 P.R. 1893. Whether a certain property is or is not under attachment at a certain time is a question of fact. 8 O.C. 449; and it is for the objector to prove that there was no legal attachment. A.W.N. (1899) 127. Attachment after the insolvency order is a nullity. 15 I.C. 950. Where one co-sharer obtains a decree for money due to him on account of his share of the rent of an *ijara* and in execution of that decree attaches in the first instance the immoveable property of his debtor, such attachment is void under Ss. 64 and 65, B.T. Act. and such attachment will not make voidable a conveyance of the property by the judgment-debtor during its continuance. 2 C.L.R. 325. An attachment in this country only prevents alienation and does not confer any title or create any charge or lien on the attached property such as attaches in England; and a creditor who has attached property in execution of a decree has no right therein prior to sale; and upon the making of an administrative order before sale the property vests in the Official Assignee and the attaching creditor is relegated to the same position as the other creditors. 44 O. 1016. An attaching creditor has no lien or charge after the making of an order of adjudication upon the debtor's property which he attaches. 15 I.C. 860. "Enforceable" means legally enforceable under the attachment. 20 A. 421; A.W.N. (1899) 98; 2 A.L.J. 265. A certificate issued by the Collector under Act VII of 1880 (Public Demands Recovery Act), no notification such as was required by Act XI of 1869 being issued, does not amount to attachment. 2 O.C. 325. The attachment must have been made duly by a written order issued and published. 13 W.R. 136. When the notice of attachment of a decree in favour of the judgment-debtor was not served on him and the case was struck off because the decree-holder took no further step, an alienation thereafter is not voidable. A.W.N. (1881) 158. The attachment must be made in accordance with the provisions of the Code. 2 Agra 206. The

mortgagee during attachment of a certain property could not object to the validity of the attachment on the ground of absence of attachment for the first time in appeal. 6 C. 129 P.C. Attachment of the property in the hands of the Receiver of the High Court without the latter's permission is not valid. 1 C. 403. A prohibitory order restraining the payee of a promissory note from receiving the money under it has not the effect of an attachment. Such an attachment is invalid and S. 64 does not apply. 64 M. 415. When the attachment before judgment is *ultra vires* and has been passed without complying with the formalities prescribed by O. 38, r. 5, the alienation during such attachment is not void. 68 I. C. 188=1922 N. 238. Where a decree is attached without notice to the judgment-debtor bound by it and the latter pays the decretal amount to the decree-holder he is entitled to have satisfaction entered up under O. 21, r. 2, and it is not open to the person who attached the decree to question the entering up of satisfaction of the decree. 13 L.W. 34=61 I.C. 815. No attachment can be regarded as complete to render alienations effected during the continuance of the attachment void against all claims enforceable thereunder unless the attachment is duly circulated and made known under O. 21, r. 54. 20 I.C. 241; 26 I.C. 204. An attachment not regularly made does not make null and void subsequent alienations. 2 A. 58; 10 W.R. 264; 1 A.W.N. 65; 83 P.R. 1898; 137 P.L.R. 1905; 1 C.L.J. 565. Where an order for attachment was made but was not executed, and the property was sold in execution, a private alienation after the order of attachment is good as against the execution purchaser. 4 B.L.R. 24. Failure to affix a copy of the notice in the Court-house under O. 21, r. 46, makes the attachment invalid as against a subsequent assignment. 9 C.W.N. 693.

THE PRIVATE ALIENATION, IN ORDER TO COME UNDER S. 64, MUST BE MADE DURING THE CONTINUANCE OF THE ATTACHMENT.—A sale made by a person with the object of defeating a probable execution against him is not necessarily one made with a fraudulent and unlawful object within the meaning of Ss. 23 and 24 of the Contract Act. 4 B. 70. The owner is not precluded from selling his property before attachment though he knows that a judgment-creditor is trying to get process of execution against it. 22 W.R. 473; 137 P.L.R. 1905; 15 W.R. 75; 29 C. 154 P.C.; 6 C. 663; 8 M.L.J. 266; 16 C. 326; 22 W.R. 476; 24 C. 825; 25 B. 202; A.W.N. (1881) 177. An assignment to trustees by the insolvent debtor for the benefit of his creditors is valid and cannot be defeated by subsequent attachment of the same in the execution of a decree. 3 Agra 104. When a property belonging to the judgment-debtor was attached and sold in execution of A's decree and both the decree-holder and the judgment-debtor applied to set aside the sale on the ground that the decree was satisfied out of court, the application was disallowed but the sale was set aside. Subsequently the judgment-debtor mortgaged the property and thereafter the property was attached and sold in execution of B's decree. The mortgage was *held* to be valid, as not made during the continuance of the attachment. 43 A. 399. To validate a bequest by a Mahomedan of more than one-third of his property to a stranger the consent of the heirs is necessary. Such a consent if given even after the property is attached in execution of a decree against the heirs does not amount to an alienation within the meaning of S. 64. 26 B. 497. When a judgment-debtor agrees to sell a property prior to an attachment effected by the decree-holder, and the purchaser obtains possession of the property under a decree for specific performance of the agreement after the attachment, the attachment cannot prevail against the rights of the purchaser under his decree for specific performance. 46 M.L.J. 361=89 I.C. 388. S. 64 avoids an alienation which was made while an attachment remained subsisting and enforceable. When an attachment ceases to exist consequent on the dismissal of an application for default, an alienation which was made pending such attachment cannot be impeached by the attaching creditor when

he attaches the property on a fresh application for execution, 4 Pat. L.T. 409=1923 P. 564. If the judgment-debt is satisfied a subsequent alienation of the property attached is not void merely because the attachment has not been formally withdrawn, 12 W.R. 457. An earlier attachment does not give the person who attaches the property a second time any right to the property against the transferee of the property for good consideration, 44 C. 662 P.C. The mortgagee of the English form is to give his complete powers of sale whenever he chooses to exercise it without further reference to the mortgage and the validity of the sale effected in the exercise of such powers cannot be affected by an attachment of the property by a third party whether before or after the default on the part of the mortgagor, 68 P.R. 1875. An alienation in pursuance of a contract made before the attachment is valid even if made during the attachment, 21 M.L.J. 82=7 I.C. 795; 23 C.L.J. 115; 3 Bom. L.R. 892; 26 I.C. 223; 6 L.B.R. 170; 8 M.L.T. 197 (*contra* in 2 I.C. 350); 38 I.C. 137=5 L.W. 234. An attachment before or after judgment has the same effect, 26 C. 531; 26 I.C. 81; 1922 N. 238; 42 M. 1; 33 I.C. 492; provided the decree is passed in the former case subsequently, 10 A. 506; 38 B. 105. An alienation between two attachments is valid, 20 W.R. 133; 1 A. 616; 8 C.L.R. 157; Where both an attachment and a private alienation were made on the same day, the alienation will be valid as against the attachment in the absence of proof that the latter was made before the former, 33 M. 429. Where pending attachment, by two creditors, of the mortgagee rights under certain mortgages, the mortgagee assigned his rights to A and directed him to pay the consideration for the assignment to the attaching creditors and the assignee afterwards paid them off but after the money in his hands had been attached at the instance of B, another creditor of the assignor, *held* that the assignee was entitled to protect himself by paying off the prior attaching creditors and that such payment did not offend against the provisions of S. 64 and could not be impeached by B, 1 L.W. 977=26 I.C. 223. The alienation must be during the continuance of attachment, 55 I.C. 481=23 O.C. 18; 13 Bom L.R. 1189=12 I.C. 923. A sale of immoveable property pending a suit against the vendors to recover a debt is valid, although the motive of the vendors is to prevent the land being attached and sold in execution, 5 M.H.C.R. 368. When after an order of attachment, but before the actual attachment of certain immoveable property of the judgment-debtor made in the manner provided by O. 21, r. 54, the judgment-debtor executed a lease deed in respect of the property, the lease was held not invalid under S. 64, C.P. Code, because prior to the date thereof an attachment of the property had not been made within the meaning of S. 64, 42 M. 565; 39 M. 389. A private alienation of an immoveable property effected after the passing of the order for its attachment not actually carried into effect cannot be treated as invalid unless proof is offered that all the preliminaries required by O. 21, r. 54, had been complied with, 26 I.C. 204=1 O.L.J. 549.

Withdrawal of attachment.—When a portion of the attached property is sold by the judgment-debtor after attachment, and on a part of the sale proceeds being paid to the judgment-creditor, the latter withdraws from the execution, the sale is not invalid, 7 W.R. 430. When the attachment is withdrawn, the alienation is valid as there is no valid attachment, 1 N.W.P. 30.

CLAIMS ENFORCEABLE UNDER THE ATTACHMENT.—For separate decrees there must be separate attachments. An attachment in execution of a decree does not avail the decree-holder of the second decree, if he has taken no steps for attachment, 45 I.C. 742=7 L.W. 573.

CLAIMS FOR THE RATEABLE DISTRIBUTION OF ASSETS ARE CLAIMS ENFORCEABLE UNDER THE ATTACHMENT.—None of the attaching decree-holders who have applied for rateable distribution under a subsisting attachment which

has since been raised by the satisfaction of the decree or otherwise are entitled to avoid a private alienation by the judgment-debtor made during the continuance of such attachment. 41 M. 265 F.B. (*contra* held in 35 B. 516 and 5 P.R. 1919 ; 37 B. 138 ; and other rulings mentioned below). A judgment-debtor's property was attached in execution of a certain decree and another decree-holder applied for attachment of the same property in execution of his decree against the same judgment-debtor. The judgment-debtor paid into Court the amount due to the first decree-holder a day prior to the sale and sold it privately to another person, *held* that the second decree-holder was entitled to a rateable distribution, under S. 73, C. P. Code, of the assets received by the Court and the private transfer of the property was void as against his claim. 8 Bur. L.T. 14=26 I.C. 264. Where there is an attachment and after that attachment a private alienation and after that again other creditors obtained decrees and put in claims for rateable distribution of assets, then although these claims are put in by persons different from the original attaching creditor and referable to different decrees, nevertheless they are claims enforceable under the first attachment. 14 Bom. L.R. 511=15 I.C. 950. If the decree under which an attachment was made was satisfied, other decree-holders who had applied for rateable distribution will not be entitled to impeach the alienation. 37 B. 138 ; 35 B. 516 ; 5 P.R. 1919 ; 44 C. 662 ; 66 I.C. 642. A transfer by the judgment-debtor of his property which has been attached by his judgment-creditors is inoperative under S. 64, as against a subsequent judgment-creditor who in execution of his decree wants to attach that property, even though that decree is passed against the judgment-debtor after he has effected transfer. 33 I.C. 492. It is immaterial for the application of S. 64, whether the decree of the plaintiff who questions a transfer was or was not passed before the time when the transfer of the property attached was effected. It is enough if the attachment was made prior to the transfer. 33 I.C. 492. To make a private alienation void under S. 64 as against a claim for rateable distribution of assets, the claim must be existing when the private transfer is made. 33 C.L.J. 7=62 I.C. 167. When a decree, in execution of which the property was attached, was satisfied and there had been a withdrawal of the attachment, another creditor obtaining an order in accordance with his prayer for a rateable distribution in the assets of the proceeds of sale of property attached by the former creditor has no right to claim to the benefit of the attachment. A subsequent alienation by the judgment-debtor is valid. 81 P.R. 1908. Persons entitled to rateable distribution are persons claiming under the attachment. 15 I.C. 950 ; 16 B. 91 (25 A. 431 ; 15 C. 771 ; 7 A. 702 ; 23 M. 478 ; 28 M. 350 ; 33 M. 429, are no longer good law). It is only when the property is sold in execution of a decree of a creditor who had attached it prior to the transfer that the transfer would be void not only against the claim of the attaching creditor, but against all claims of creditors who had applied to the Court for attachment or for rateable distribution before sale. 1926 S. 177 ; see 44 C. 662 P.C. ; 41 M. 265 F.B. In order that claims for rateable distribution be considered as claims enforceable under the attachment, it is not necessary that the claims were actually being enforced at the time of private alienation. 33 I.C. 492 (C.) ; 1922 B. 241 ; 16 B. 91 ; 1926 M. 307=49 M. 38.

THE TRANSFER IS VOID AS AGAINST CLAIMS ENFORCEABLE UNDER THE ATTACHMENT.—It is void as against persons interested in the attachment and not against the whole world. 2 B.L.R. 49 F.B. ; 17 W.R. 313 P.C. ; 2 A.L.J. 265 ; 1 N.W.P. 18 ; 4 C.P.L.R. 69 ; A.W.N. (1900) 155 ; 8 C. 279 ; 11 W.R.O.C. 1 F.B. ; 2 A.W.N. 210 ; 16 B. 91 ; 29 C. 154 ; 10 B.L.R. 134 P.C. ; 13 W.R. 134 ; 23 M. 478 ; 8 C. 279 ; 12 W.R. 457 ; 1 N.W.P. 125 ; 1 N.W.P. 30 ; 25 A. 431 ; 6 N.W.P. 217 ; 14 W.R. 25 ; A.W.N. (1882) 210 ; A.W.N. (1900) 148 ; 1 W.R. 212 ; 9 W.R. 544 ; 1 B.H.C. 159 ; 7 C. 107 P.C. ; 1 N.W.P. 18 ; 35 B. 516 ; 6 A. 33. A private alienation with the consent of the decree-holder cannot be impeached by him. 23 M. 478 ; A.W.N. (1886) 176 ; 6 N.W.P. 296 ; A.W.N. (1900) 148. When it appeared that the

purchaser after attachment was led by the conduct of the attaching creditor to believe that the latter had no objection to the sale, he was not in a position to object to the purchase. A.W.N. (1886) 176. The debtor himself cannot take advantage of it, 10 W.R. 380. If the debtor satisfies the decree, the sale is valid. 11 B.H.C. 159; 12 W.R. 457; 1 N.W.P. 114, 125; 8 C. 279; 14 M.I.A. 543; 550; 20 A. 424; 35 B. 516. Such a sale would under the section be void only as against claims enforceable under the attachment, but the decree having been satisfied by payment into Court, there is no claim outstanding which is enforceable under the attachment. 6 N.W.P. 296; 7 W.R. 430. A transfer which does not in any way interfere with the rights secured by an attachment is valid. 20 A. 421; 26 I.C. 223; 29 C. 154 P.C. (*contra* in 18 A. 123). If the judgment-debt is satisfied a subsequent alienation of the property attached is not void merely because the attachment has not been formally withdrawn. 12 W.R. 457. An alienation is not absolutely void but voidable only. 12 C. 317; 1 N.W.P. 18; 1 N.W.P. 125; 9 W.R. 307; 6 N.W.P. 217; 6 N.W.P. 296; 18 W.R. 279 (*contra* in 7 W.R. 510—it is illegal); 1925 R. 282. It is void as against the claims enforceable under attachment. 63 I.C. 103. An alienation by a father of the right, title and interest of a son in a joint ancestral property is void against claims against the attachment in execution of a decree against the son. 33 B. 264. An assignee of an attaching creditor's rights or the next-of-kin of a deceased attaching creditor may be said to be claiming under the attaching creditor. 11 B.H.C. 159. Where a portion of the property attached is sold privately by a judgment-debtor after the attachment and the decree-holder is unable to realise the amount of his decree out of the portion left unsold, he is entitled under S. 64 to proceed against the portion unsold. 34 I.C. 91. A purchaser during the continuance of an attachment has not even the lien to the extent of the purchase money paid by him. 34 I.C. 34.

WAIVER OF THE RIGHT BY THE ATTACHING CREDITOR.—The prohibition against alienation after an attachment is for the benefit of the decree-holder which he can waive and an assignee from him with knowledge of such waiver stands in the same position as his assignor and cannot execute the decree against the property alienated. 44 M.L.J. 80=72 I.C. 839. When a decree-holder permits an alienation pending attachment to be notified at the sale, he cannot afterwards question the validity. 3 O.L.J. 422=36 I.C. 732.

EFFECT OF ATTACHMENT OF DEBT.—A decree-holder cannot by means of attachment in execution of his decree stand in a better position as regards garnishee than does a judgment-debtor. He can only obtain what the judgment-debtor could himself give him. 40 O.L.J. 228=84 I.C. 1022. Mere attachment of a debt does not prevent the judgment-debtor from suing his debtor, though he is not entitled to receive payment from his debtor unless the claim in respect of which the debt is attached has been satisfied. 10 I.C. 569; 14 A. 162; 17 A. 193; 142 P.R. 1894. An order of attachment of a debt does not operate as a bar to the institution of a suit for the recovery of the attached debt unless the order so expresses it. 5 O.L.J. 766=49 I.C. 88. An attachment of a debt does not bar the debtor from paying the money into Court and obtaining effectual discharge. 112 P.L.R. 1913=19 I.C. 205. When a debt due to the judgment-debtor is attached the judgment-creditor cannot sue to recover the debt on the denial of the garnishee to pay. 27 P.R. 1874. The Court has no power under O. 21, r. 46 to call upon a person (the debtor) to show cause why he should not pay his debt into Court. It is optional with the debtor to pay the amount of his debt into Court. If the Court is satisfied that there is a subsisting debt, the debt must be sold. 10 M. 194; 21 A. 145; see 11 B. 448. The attachment of debt does not create in favour of the creditor a title which prevails against the Official Assignee under the vesting order in Insolvency if the creditor has not availed himself of the attachment before the date of the vesting order. 26 M. 673. When a debt is attached a claim may be preferred

by a third person under O. 21, r. 58. 27 M. 67 ; 8 I.C. 608=3 Bur. L.T. 34. When a debt is attached in execution of two decrees before judgment of different Courts, a voluntary payment of the debt into one Court against one decree does not put an end to the attachment in the other decree and the debtor of the judgment-debtor is liable to pay over again to the holder of the other decrees. 17 M.L.J. 488.

Attachment of debt and extension of limitation.—An attachment under O. 21, r. 46, is not an injunction or an order staying a suit within the meaning of S. 15 of the Limitation Act so as to extend limitation for the suit to recover the debt. 13 A. 76 ; 14 A. 142 ; 17 A. 198 P.C. The creditor may institute a suit to recover the debt (*ibid*).

EFFECT OF ATTACHMENT OF A DECREE.—An attachment of a decree under O. 21, r. 53, prevents the Court from proceeding with its execution, but it does not render it incapable of execution by the decree-holder or destroy the interest of the decree-holder in it. There is nothing to prevent the filing of the execution application. 13 M.L.J. 265 ; 5 I.C. 56. An order of stay under O. 21, r. 53 (1) (b) does not prevent either the decree-holder of the decree sought to be executed or his judgment-debtor from seeking to execute the original decree and does not therefore interrupt the running of time against him under S. 15 of the Limitation Act. 48 B. 485.

Attachment of a decree that is reversed in appeal.—Where a decree is attached which on appeal is reversed by a compromise between the parties, there is no subsisting decree capable of attachment and the attaching creditor has no remedy. He is himself to blame for having attached a decree for which there was a chance of being set aside. 22 P.L.R. 1905.

The order of attachment has the effect of staying further execution and of debarring the Court from proceeding further until that bar has been removed in either of the ways specified in the rule. When the Court notwithstanding such order proceeded in execution and sold the property, the sale is invalid, 32 O. 1104. The attachment does not render the decree incapable of execution by the decree-holder or destroy the decree-holder's interest in it. It merely delays the realisation of his interest in it. An application for execution may be filed. 13 M.L.J. 285 ; 5 I.C. 56 ; 26 A. 91. It is not competent to the Court to substitute the attaching creditor's name and to allow him to pursue the execution. 26 A. 91 ; 28 A. 771 F.B.

Attachment and limitation.—An attachment of a decree operates as a stay of its execution by order of the Court and the time during which it was under attachment should be deducted in computing the period of limitation. 30 I.C. 587 (*contra* in 48 B. 485 ; it does not extend limitation under S. 15 of the Limitation Act). Payment of the attached decree to the holder of the attached decree is invalid as long as the attachment subsists. 24 I.C. 795. He cannot enter up satisfaction of the decree. 48 I.C. 109=24 M.L.T. 495.

EFFECT OF ATTACHMENT ON ADVERSE POSSESSION.—When a trespasser is holding the property adversely to the owner thereof, the attachment of the property by a judgment-creditor of the owner does not arrest the running of time in favour of the trespasser. 11 M.L.J. 344.

EFFECT OF PARTITION PENDING ATTACHMENT.—An order of attachment by the Civil Court covers the property actually attached and cannot be held by implication to apply to other property of the judgment-debtor when he has ceased to be the owner of the property originally attached. 20 I.C. 43.

PROPERTY OF A CO PARCENER.—An attachment of the share of a co-parcener in a joint Hindu family property prevents the acquisition by survivorship in the event of the

death of the co-parcener. 16 M.L.T. 123; 4 M. 302. But an attachment before judgment has no such effect when the judgment-debtor dies before the passing of the decree. 17 M. 144. But the death of the judgment-debtor after the passing of the decree bars the right of survivorship in case of attachment before judgment. 26 M.L.J. 517. An order for attachment without an order for sale is sufficient to bar the right of survivorship. 4 M. 302 (*contra* held in 38 B. 105 that the order for sale is necessary.) When the undivided share of a co-parcener is attached in execution of a decree, but the co-parcener dies before the sale thereof, the effect of such attachment is to bring the interest of the judgment-debtor under the control of the Court for the purpose of executing the decree so as to preclude the accrual of a title by survivorship. 4 M. 302; 6 I.A. 88; 30 M. 413; 32 M. 429; 89 I.C. 291.

SUIT.—A suit by attaching creditor is not maintainable to avoid an alienation. The matter relates to execution. 28 C. 492.

X.—INVALID ATTACHMENTS.

PRESUMPTION OF VALID ATTACHMENT.—When the record is destroyed, the Court should presume that official acts were regularly performed and should not throw upon the person asserting the validity of attachment, the burden of proving, by definite evidence, due service of the proclamation order. 46 A. 741.

EFFECT OF INVALID ATTACHMENT.—An attachment not regularly made does not make null and void subsequent alienations. 2 A. 59; 10 W.R. 264; 1 A.W.N. 65; 83 P.R. 1898; 137 P.L.R. 1905; 1 O.L.J. 565. Where the irregularities in attachment are immaterial and not productive of any substantial injury or injustice to the applicant, the proceedings cannot be set aside. 6 W.R. Mis. 52. When the decree-holder wantonly attached more property than was necessary for the discharge of the claim, the Court may order sequestration of only a portion of the property attached. 1 Agra Mis 3. An attachment and sales of Zamindari interest of a judgment-debtor in a certain property when in fact he had only the *muafi* interest does not affect his *muafi* interest and the attachment so effected is not with respect to the latter rights. 13 A. 119. The attachment of a judgment-debtor's property is not illegal merely because other property not belonging to him was also included in it. 13 I.C. 795 = 22 M.L.J. 228. See also Chap. VIII, under "Irregularities."

DATE OF RETURN OF WARRANT.—A warrant which does not bear the date before which it should be executed is not a good warrant. 36 I.C. 871 = 18 Or. L.J. 39; 37 O. 122; 31 O. 424. The execution of a time-barred warrant is not legal and the person authorised for execution cannot go upon the land of the person in possession. 31 O. 424. In such a case a person resisting a peon is not liable under S. 183, I.P.O.; 10 C. 18; 76 I.C. 655. A distress warrant under the Public Demands Recovery Act the time for which has been extended, but has not been noted on the face of the warrant, is not legal. 37 O. 122. Execution of a warrant by a peon within the time fixed by the Court but beyond the time fixed by the Nazir who endorsed the warrant, is legal, as the peon derives his authority from the Court and not from the Nazir, 40 C. 849.

ATTACHMENT OF MONEY IN A COURT IN ANOTHER DISTRICT.—It is illegal for a Court to attach money lying in a Court in another district. The proper procedure is to notify under O. 21, r. 52, and to have the decree transferred to the latter Court. 26 I.C. 941 = 7 Bur. L.T. 277. When property is attached by and is in the custody of one Court, it can be attached only by a notice to that Court, otherwise the attachment is irregular and does not entitle the subsequent attaching creditor to rateable distribution. 11 I.C. 859.

ATTACHMENT OF SALARY.—When a Court did not attach the right to the allowance or salary but granted and issued an injunction to the disbursing officer to pay the amount in Court, the latter order does not amount to attachment. 5 I.C. 820 = 7 M.L.T. 110 ; 5 I.C. 145.

ATTACHMENT OF MOVEABLES.—When a house is entered into by gaining entrance over the roof, the attachment of moveables therein is not invalid. 25 I.C. 117. When no copy of the attachment order was affixed in the Court house the attachment is ineffectual. 9 O.W.N. 693.

ATTACHMENT OF IMMOVEABLE PROPERTY.—When an order of attachment is not affixed in the Court house, the attachment is ineffectual. 9 O.W.N. 693. The omission to affix a copy of an attachment order on a conspicuous part of the Court house and of the office of the Collector and some conspicuous part of the land attached invalidates an attachment. 60 I.C. 527. Where in execution of a decree, a mortgage bond of the judgment-debtor in the custody of a third person was attached and sold only as moveable property and not according to the provisions of O. 21, r. 54, it is a mere irregularity and does not vitiate sale, especially when the sale is not opposed by the judgment-debtor and becomes final. 8 M.L.J. 1 ; 18 M. 437. The omission to affix the order of attachment of immoveable property in the office of the Collector as required by O. 21, r. 54, does not render the attachment invalid, if all the other formalities prescribed by the rule have been complied with. 41 M. 844 ; 69 I.C. 563 = 1923 N. 78. In order to constitute a valid attachment the procedure described in the 2nd part of O. 21, r. 54, must be carried out. 4 L. 211. An omission to affix a copy of attachment order on a conspicuous part of the Court house, office of the Collector or the land attached is a fatal defect invalidating the attachment. 60 I.C. 527 (L.). When a copy of the attachment order is not affixed in the Collector's office, such a defect, though it may render the attachment ineffectual for the purpose of avoiding subsequent alienations, cannot affect the validity of the attachment against the judgment-debtor and the execution proceedings cannot be declared effectual on that ground. 7 A. 731 ; 11 C.W.N. 163 = 5 C.L.J. 80. When an attachment was made under O. 21 r. 54, instead of under O. 21, r. 46, it was *held* that whether the attachment ought to be made under one rule or the other, when all the parties knew that the right and interest of the mortgagors under the mortgage were being put up for sale and their interests having been sold and the sale having been confirmed and a certificate granted to the purchaser, he was entitled to have a good title. 18 A. 469.

ATTACHMENT OF DECREES.—An attachment of a decree after it is assigned to another is invalid. 4 I.C. 125.

ATTACHMENT OF DEBT.—When a debt is attached either before judgment or in execution of a decree, a copy of the order of attachment must be put up in a conspicuous part of the Court house. Failure to comply with this provision invalidates the attachment as against third parties. 4 Bur. L.T. 148 = 12 I.C. 869. When in execution of a decree the interest of the debtor under a usufructuary mortgage was attached under O. 21, r. 54, *held* that the debt having fallen due (though the personal remedy of the creditor was barred) the attachment ought to have been made under O. 21, r. 46, and in the absence of such attachment the mortgagor who had paid the mortgage money to the judgment-debtor in ignorance of the attachment was protected. 39 M. 389. A debtor is not absolved from liability to pay debt to his creditor merely because he paid the debt to a decree-holder on receipt of warrant attaching the debt in execution of his decree when the judgment-debtor was not in fact entitled to recover the money. He ought to have contested his liability to pay the debt to the decree-holder. 50 P.L.R. 1915 = 28 I.C. 317. An omission to prohibit the creditor from

receiving the debt and to fix up the prohibitory order in some conspicuous part of the Court house is sufficient to vitiate an attachment of a debt. 79 P.L.R. 1907; 9 C.W.N. 692.

NO EXISTING DECREE.—An attachment which is not based on any decree in existence at the time is null and void. 29 M. 175.

ATTACHMENT AFTER THE INSOLVENCY ORDER.—An attachment after the insolvency order is a nullity. 15 I.O. 950 = 14 Bom. L.R. 511.

WARRANT OF ATTACHMENT.—Where a warrant of attachment of moveable property does not authorise the seizure of goods of the judgment-debtor or does not purport to give the peon authority to enter into the house of the judgment-debtor for the purpose of attaching the property, this is not a warrant which can be legally executed against the judgment-debtor. 29 C. 244. When a warrant is issued by the Court and addressed to the bailiff to be executed within August 30 and the Nazir addressed the warrant to a peon with a direction to execute it on or before August 25 and the peon executed the warrant between August 25 and 30, *held* that the execution was lawful and in rescuing the property attached by the peon from him, the accused was guilty of an offence. 40 C. 849. When a public servant attaches property under a warrant in execution of a decree he must have the warrant with him; otherwise the attachment is illegal. 27 A. 258; 5 A. 318. A warrant that does not bear the seal of the Court is illegal and hence resistance to attachment under such a warrant is not illegal. 3 Pat. L.J. 636 = 49 I.O. 171.

LIABILITY FOR WRONGFUL ATTACHMENT.

WHO ARE LIABLE FOR WRONGFUL ATTACHMENT.—The judgment-creditor, his attorney or agent and the officer of the Court will be held responsible for attaching the goods of a stranger in execution. 20 P.R. 1877. The attachment is made at the risk of the attaching creditor and he is responsible for any results which can be traced to an unlawful attachment carried out upon application made by him. 14, O.C. 343. The decree-holder who has obtained attachment of the property of the judgment-debtor is liable for the value of the property stolen during the subsistence of the attachment. The cause of action arises on the date of the wrongful attachment. 6 I.O. 789; 3 B. 74; 17 C. 436; 17 I.A. 17. When a village officer refused to release the property from attachment notwithstanding the orders of the Tahsildar, the former is liable for damages as under the general law any servant who commits a tort under the orders of his master is liable to be personally sued. 26 M. 263. A suit for damages lies for invalid attachment against the decree-holder. 3 A. 504. A decree-holder, attaching property not belonging to the judgment-debtor is liable for damages for committing trespass. 17 C. 436 P.O.; 12 W. R. 329; 5 N.W.P. 211; 9 B.H.C. 92; 8 B.H.C. A.O. 177; 3 B. 74; 7 W.R. 355; 11 W.R. 516; 28 C. 540; 5 B.L.R. 71 App. In England a judgment-creditor is not responsible for the consequences of a sale under a judicial order of goods illegally taken in execution in satisfaction of his debt. The sheriff alone is responsible to those interested for the illegal seizure of goods which do not belong to the judgment debtor. While in India, warrants for attachment are issued on the *ex parte* application of the creditor who is bound to specify the property for which he desires to attach and its estimated value. The attachment whether legal or illegal is the direct attachment of the creditor for which he becomes immediately responsible in law. 17 C. 436 P.O.; 7 C.P.L.R. 77. No action lies against any person for issuing execution or otherwise acting in pursuance of a valid judgment or order of a Court of justice even though it is erroneous and is afterwards set aside for error. 15 C.L.J. 515. Attachment of property in execution is not an act of the Court, but of the

party himself ; and the decree-holder is liable for the trespass in respect of the property of a stranger. 12 W.R. 329 ; 5 N.W.P. 211 ; 3 B. 74 ; 28 O. 540 ; 129 P.R. 1908 ; 4 N.L.R. 49 ; 13 O.C. 957, (960.)

DAMAGES FOR WRONGFUL ATTACHMENT.—Liability to damages arises from wrongful attachment. 17 W.R. 150. A suit for damages for wrongful attachment of property seized in execution of a decree when a decree has already been obtained in a former suit for the recovery of the value of the same property, is barred. 18 W.R. 337. A suit for damages for wrongful attachment lies. This right is not affected by the fact that the property under attachment was released on security being furnished. When the attachment was needless, unjustifiable and without any due authority of law the award of damages in respect of the injury and loss sustained would be free from any legal objection. 1 Agra 104. A judgment-creditor, if he attaches property which does not belong to the judgment-debtor, commits a trespass for which he is liable in damages, even though he may have acted without malice and under a mistake. 8 B.H.C. A.C. 177 ; 11 B.H.C. 46. A mere attachment is a sufficient invasion of a person's right to give him a cause of action. 9 I.C. 663. Parties whose property is seized are not bound to get it released and their declining to do so does not shift the responsibility of the illegal acts of those attaching it. 13 W.R. 3.

NATURE OF PROOF IN A SUIT FOR DAMAGES.—Mistake however honest or inevitable is no defence for him who intentionally interferes with the person or property of another. When the judgment-creditor obtains an attachment of the property of the plaintiff under an erroneous impression that he had a decree capable of execution, he is liable to be sued for damages in trespass. If a litigant executes any form of legal process which is invalid for want of jurisdiction he commits an act in the nature of trespass to person or property. He is liable, therefore, in an action of trespass. It is not necessary to prove malice or want of reasonable or probable cause. A litigant who effects an arrest or seizes property must justify the trespass by pleading a valid execution of legal process and any irregularity or error which has the effect of making the process totally invalid will deprive him of all jurisdiction. 15 C.L.J. 515. Where in execution of a decree goods belonging to a person who was not a party to the suit are wrongfully attached the owner of the goods can recover damages for the wrongful attachment although the attachment may have been made in good faith. 2 R. 181—83 I.C. 433. A suit by a person whose property has been wrongly attached in execution cannot be considered as an action for tort, but the decree-holder is accountable for in damages though his wrong-doing was unintentional, in an action for conversion. The question of contributory negligence could only arise in the case of an action based on negligence. The third person's neglect in so far as it excused the decree-holder's wrong-doing could only be taken into account (in assessing damages by requiring the plaintiff to prove strictly the damages suffered by him. 129 P.R. 1908, see 20 C. 296 P.C.

MEASURE OF DAMAGES.—In a suit for damages arising out of a wrongful attachment, the usual rule is to award an amount which will be as near as can be estimated to that by which the plaintiff is the worse from the defendant's wrong-doing, provided that the harm suffered by the plaintiff is a natural and probable consequence of the defendant's wrong-doing. The principle of the rule is the same as of S. 73, Contract Act. A Court need not have much compassion for the trespasser and is bound to be exact in assessing damages. The fact that the plaintiff caused the sale to be stayed would not affect the right to damages for wrongful attachment. 8 I.C. 1206. In assessing damages the Judge should take into consideration all the circumstances of each case so far as they may be reasonably presumed to be within the knowledge of the

defendant at the time when he committed the act which forms the cause of action and allow for their immediate and natural consequences. 18 W.R. 337. There is nothing in rr. 58-63 binding a plaintiff's right to compensation for his loss or the defendant's liability for his wrongful act. If the existence of the summary procedure leads to delay and that delay to further loss, the consequences must fall on the defendant. 12 O. 696.

LIMITATION FOR A SUIT FOR DAMAGES.—A suit for damages for wrongful seizure of property is governed by Art. 29 and not Art. 49 of the Limitation Act, 1908. 27 M. 346 ; 29 A. 615 ; 4 N. L. R. 49 ; 18 M. L. J. 590. The date of the complaint of wrongful attachment is the starting point for limitation in a suit for damages. 7 B. 427. The article applicable is Art. 29 of the Limitation Act whether the suit is for damages or value of the property seized. 23 M. 621 ; 11 M. 345 ; 24 A. 146 ; 7 O.W.N. 520. Art. 29 applies to a suit for compensation for wrongful seizure of moveable property under legal process. 9 I.C. 773 ; 4 A. L. J. 548 ; 29 A. 615 ; 18 M.L.J. 590 ; 4 M.L.T. 271 ; A.W.N. (1907) 194. Art. 29 would apply to the case of a plaintiff who without being the owner of the property claims to be entitled to compensation on the basis that he has an interest in the property wrongfully seized. 10 M.L.T. 381.

Extension of time.—No allowance of time can be made for the time spent in litigating the title in a suit under O. 21, r. 63 ; 4 M.L.T. 271.

EXTENT OF ATTACHMENT.—There is no extent to which a property can be attached. There is no rule to the effect that the properties of the judgment-debtor are to be attached only to the extent that may be necessary for the satisfaction of the decree. 16 I.C. 708. But see O. 21, r. 64 as to the sale of a portion of the property attached.

CHAPTER VIII.

SALES IN EXECUTION.

I.—WHAT COURTS MAY ORDER SALES.

SALES OF IMMOVEABLE PROPERTY.—Sales of immoveable property in execution of decrees may be executed by any Court other than a Court of Small Causes. (O. 21, r. 82.)

A Court of Small Causes has no power to attach immoveable property in execution of the decree or to adjudicate on claim proceedings resulting out of it. 28 O.W.N. 16. A right to a portion of immoveable property cannot be sold in execution by a Court of Small Causes. 10 N.L.R. 17=23 I.C. 156. The rights and interests of a judgment-debtor under a mortgage-deed hypothecating to him immoveable property are not saleable by a Court of Small Causes. 6 N.W.P. 122.

ANY COURT EXECUTING A DECREE.—Any Court executing a decree may order that any property attached by it and liable to sale, or such portion thereof as may seem necessary to satisfy the decree, shall be sold, and that the proceeds of such sale, or a sufficient portion thereof, shall be paid to the party entitled under the decree to receive the same. (O. 21, r. 64.)

DISCRETION OF THE COURT.—Though O. 21, r. 64 prescribes that a Court may order sale, it is obligatory for it to do so when a valid application is made to it. (1915) M.W.N. 159=28 I.C. 62. The word "may" in this rule means "shall" 12 O. 317. It is competent to the Court in executing a mortgage decree to exercise its control in bringing the different items of property comprised in the decree to sale in a particular order to adjust equities between the parties. 23 M. 217. A Court cannot sell property which has not been attached. 42 I.C. 259 ; 35 I.C. 469 ; 9 I.C. 918=13 C.L.J. 213. But as to the effect of absence of attachment, see *infra* "Irregularities" under r. 90.

WHEN PROPERTY IS ATTACHED IN EXECUTION OF DECREES OF SEVERAL COURTS.—(1) Where property not in the custody of any Court is under attachment in execution of decrees of more Courts than one, the Court which shall receive or realise such property and shall determine any claims thereto, and any objection to the attachment thereof, shall be

the Court of the highest grade, or where there is no difference in grade between such Courts the Court under whose decree the property was first attached.

(2) Nothing in this section shall be deemed to invalidate any proceedings taken by a Court executing one of such decrees. (S. 63.)

LEGAL CHANGES.—This section corresponds with S. 285 of the old Code. (1) Sub-s. (2) is new. (2) The words "is under attachment" have been substituted for the words "has been attached". These words have been substituted to make it clear that the provisions of this section do not apply unless there are two or more attachments existing at the same time. 6 A. 255.

OBJECT OF THE SECTION.—The object of the section is to prevent different claims arising out of the attachment and sale of the same property by different Courts or to prevent confusion in the execution of decrees. 25 C. 78 ; 12 C. 333.

SCOPE.—This section applies to attachment of both moveable and immoveable property. 7 M. 47 ; 1881 P.J. 210. It is doubted in 7 C. 410 if the section applies to immoveable property.

CLAIMS AND OBJECTIONS.—The claims and objections referred to in this section are those provided in O. 21, r. 64 or O. 21, rr. 58-62. An application for rateable distribution cannot be deemed to be one for determination of any such claim or objection within the meaning of this section. 14 C.W.N. 396 = 3 I.C. 105.

SUB-SECTION (2).—Under the old Code of 1882 there was a conflict of decisions whether the provisions of this section are a rule of procedure or affect jurisdiction. The High Courts of Calcutta, Bombay and Madras held that the rule was merely a rule of procedure and it did not oust the jurisdiction of the inferior Court in proceedings in execution of its own decree. 12 C. 333 ; 25 C. 46 ; 34 C. 836 ; 22 B. 88 ; 19 B. 127 ; 18 B. 458 ; 21 C. 200 ; 22 M. 295 ; 19 C. 651 ; 13 O.P.L.R. 145 ; 19 B. 539. The other view taken by the High Court of Allahabad was that the section affected jurisdiction, i.e. ; it took away the jurisdiction of the inferior Court in the several matters specified in the section. 26 A. 538 ; 27 A. 56 ; 31 A. 527 ; 4 A. 359 ; 22 M. 295 ; 5 A. 615 ; 29 C. 773 ; 18 A. 348. The result of adding sub-section (2) is that where property is under attachment by two courts one of which is of a higher grade than the other, and the property is sold by the Court of the lower grade in contravention of the provisions of sub-section (1) the sale is not thereby rendered invalid, though the Court selling the property and the purchaser at the Court sale may be aware of the irregularity. 84 I.C. 265. The course to be adopted by the Court of the higher grade in such a case is to accept the sale made by the lower Court and send for the sale proceeds for distribution amongst the decree-holders. 12 C. 333 ; 18 B. 458 ; 23 I.C. 909 = 26 M.L.J. 406 ; 41 I.C. 612 = 23 M.L.J. 217 ; 2 Pat. L.T. 719 = 62 I.C. 33 ; 30 I.C. 779 = 13 A.L.J. 893. A sale in contravention of S. 63 (1) is not null and void, but merely irregular. The mere fact that the Court ordering the sale had notice of an attachment by a superior Court does not oust the jurisdiction of the former Court, and the sale cannot be treated as a nullity. 41 I.C. 612 ; 75 I.C. 325 = 1924 C. 168 ; 47 M.L.J. 720 = 20 L.W. 864.

COURT OF HIGHEST GRADE.—Grade depends on the pecuniary and other limits of the jurisdiction of the Court. 19 B. 127 ; 22 B. 88. The Court of a Munsiff

in the N.W.P. or a first class Sub-Judge in Bombay is regarded as a Court of Higher grade than a Court of Small Causes. 16 A. 11 F.B. ; 19 B. 127 ; 22 B. 88. A Sub-Court is of a higher grade than a Munsiff's Court. 41 I.C. 612=33 M.L.J. 217. There can be no comparison between Civil and Revenue Courts as to their grades. 22 A. 182 ; 19 A.L.J. 649 ; and where certain property is attached by both Civil and Revenue Courts, the purchaser at the first sale in any Court takes a good title. 22 A. 182 S. 63 applies only as between Civil Courts, or where the section is extended to Revenue Courts, as between Revenue Courts. Where subsequent to an attachment of property by a Civil Court, the same property was sold by a Revenue Court, the purchaser can maintain a suit for a declaration that the property was his and not liable to be sold in execution of the Civil Court's decree. 43 A. 612. A District Court is of a higher grade than a Munsiff's Court. (1921) M.W.N. 507. A District Court is of a higher grade than a Subordinate Judge's Court. 1 I.C. 78.

COURTS OF EQUAL GRADE.—Where the two Courts attaching the property are of equal grade the one first attaching only has the power under S. 63 to proceed with the sale. 6 Pat. L.J. 382 ; 4 A. 359 ; 25 I.C. 906=(1914) M.W.N. 796 (*contra* held in 19 C. 651 ; 12 A. 399).

TRANSFER OF PROCEEDINGS TO THE HIGHER COURT.—Proceedings may be transferred from the lower to the higher Court under S. 63. 15 L.W. 245. Where property attached by a lower Court is already, or becomes, subject to an attachment issued from a superior Court, the decree-holder must apply to the lower Court to transfer his application to the Higher Court for rateable distribution of assets. 16 B. 689.

ANY CLAIM THERETO.—Any claim means the claim or objection which can be inquired into in execution proceedings. 3 I.C. 105 ; L.B.R. (1893—1900) 161.

PROPERTY.—"Property" means "moveable or immoveable property." 7 M. 47 ; 3 A 356 ; 6 M.L.J. 332 ; 7 O. 410.

APPEAL.—An order of a Court of lower grade refusing to proceed with an execution on the ground that execution had already issued from a court of higher grade is one under S. 47 and appealable. 42 I.C. 466=26 C.L.J. 42.

II.—SALE BY WHOM CONDUCTED AND HOW MADE.

Save as otherwise prescribed, every sale in execution of a decree shall be conducted by an officer of the Court or by such other person as the Court may appoint in this behalf, and shall be made by public auction in the manner prescribed. (O. 21, r. 65.)

PERSONS CONDUCTING SALE.—In the absence of the Sub-Judge, the District Judge cannot perform the duties because he is a superior officer, 12 W.R. 238. The employment of an agent for the conduct of a sale in execution of a decree is clearly contemplated by O. 21, r. 65 and the fact that the Court appoints a nominee of the parties to a consent decree to conduct the sale and dispense with the usual preliminaries, such an attachment and the issue of notice, does not render it any the less a sale by Court. 44 C. 789. The words "as the Court may appoint" apply not only to the words "any other person" but also to the officers of the Court who cannot without such appointment sell the property. 12 W.R. 238. When a sale was conducted by a Peshkar

by direction of his Munsiff who was undisposed, it was upheld when no substantial injury resulted from such sale. W.R. 1864 page 44. The fact that the creditor and his attorney have directed the sheriff to seize the property does not make the latter the creditor's agent for the purpose of selling it. 3 O. 806 ; 6 O. 356.

PUBLIC AUCTION-BID.—Where a person goes to bid at a sale in execution of a decree and in full knowledge of the conditions of sale in sale proclamation, offers bids for the property and the property is knocked down to him, the mere fact that the Court has subsequently the discretion, to confirm or annul the Nazir's auction does not leave it open to the bidder to withdraw his bid. Condition 3 of the proclamation of sale gives the court a quasi revisional discretion in the matter and does not require the Court itself to knock down the property. 19 C.W.N. 633=27 I.C. 805. A bid at a Court sale is merely an offer, or, in the language of S. 6 of the Contract Act, a proposal. It is the highest bid that is regarded as having made the final proposal which may or may not be accepted by the auctioneer. Every bid that is made does not remain in abeyance pending the acceptance by the auctioneer. Where a higher bid is made, all preceding lower bids are impliedly refused. Where the highest bidder dies, the proper course for the Court is to direct a fresh auction and not to treat the next highest bidder as the auction-purchaser. 42 M. 776. A bidding at an auction sale is a mere offer which may be retracted before the hammer is down. 14 M. 235. A bidder at an auction sale can withdraw his bid before it is knocked down. 78 I.C. 710. A sale is not complete until the officer conducting the sale of immoveable property accepted the final bid and the purchaser has deposited the amount required by O. 21, r. 84. 35 A. 65 ; 50 I.C. 914 ; 1923 Pat. 190=76 I.C. 113. So far as the rights and liabilities of vendor and purchaser are concerned an auction sale of immoveable property is not different from a contract of sale under the T.P. Act. As soon as the auctioneer acting as the agent of the vendor lets the hammer fall and thus accepts the bid of the purchaser, a contract of sale is created. It does not of itself create any interest in, or charge on, such property. The vendor becomes a trustee for the purchaser of the estate and the vendee acquires a right *in personam* against the vendor, not a right *in rem* affecting, or binding the property of third persons. But the legal estate in the property passes only after the execution of deed of conveyance and if the property is injured before such execution, the purchaser takes the risk. 52 P.R. 1897. When a Nazir accepts the deposit required, from the highest bidder, there is only in law an offer and it is open to the Court to resume auction. 4 Pat. L.T. 498=1923 Pat. 190 ; 1923 C. 316. A purchaser at a Court sale purchases subject to the sanction of the Court and the Court has a right to set aside the sale effected by the Nazir. 13 I.C. 597. In a resale for default the officer conducting the sale need not commence from the next highest bid below that made by the defaulter. 1 W.R. Mis. 11 ; 42 M. 776. There is no resale of the property if the property is knocked down on the occasion of the second sale. 1886 P.J. 263. A property was knocked down to A in execution of a decree held by B. The same property was sold next day, in execution of a decree held by C, who had a previous lien on the property. A having refused to pay the purchase money, was made liable for the loss occasioned by the second sale. 9 W.R. Mis. 126 ; 6 W.R. 500. The officer conducting the sale cannot insist upon a deposit being made before the bid is accepted. But if it appears to him that a person without means has been put forward to make a sham bid in order to frustrate the sale, he would be justified in inquiring into the trustworthiness of the bidder before accepting his bid. 5 W.R. 7 P.O. And the sham bidder is liable for obstructing the sale. W.R. 1864 Mis. 30.

Bid of one person not to be treated as that of another.—It is not competent to one person to avail himself of the bid of another at a Court auction and constitute himself the purchaser by depositing the purchase money, nor can the consent of the bidder improve his position in this matter. 21 O.C. 212=47 I.C. 999. When the

property to be sold is a negotiable instrument or a share in a corporation, the Court may instead of directing the sale, to be made by public auction, authorise the sale of such instrument or share through a broker. (O. 21, r. 76.)

PLACE OF SALE.—A sale of moveable property shall ordinarily be conducted at some place within the jurisdiction of the court ordering the sale. Good and sufficient reason ought to be shown for directing otherwise where a sale could be held within the jurisdiction of the Court which executes: the decree the mere fact that a higher price is to be bid by holding the sale at a place outside the jurisdiction of the Court is no reason for deviating from the ordinary rule. 13 B. 22.

As to place of sale of immovable property see *infra*.

RULES MADE BY THE RANGOON HIGH COURT.—In O. 21 the following shall be substituted for r. 65:—O. 21, r. 65.—(1) Sales shall be conducted by the Bailiff or Deputy Bailiff, but the duty may be entrusted to a process-server when the property is moveable property not exceeding Rs. 50 in value, and when, in the opinion of the Court, for reasons recorded in the diary of the case, the Bailiff or Deputy Bailiff cannot personally conduct the sale. (2) Subject to the terms of the proviso to r. 49 and of r. 74, some one day in each week shall be set apart and regularly observed for holding sales in execution of decrees; and some well-known place in the vicinity of the Court house or the public bazaar shall be selected for the purpose. (3) Subject as aforesaid, and unless the court is of opinion that for any special reason a sale on the spot, where the property is attached or situated will be more beneficial to the judgment-debtor, all property, whether moveable or immovable attached in execution of the decree shall be sold at the time and place selected. The day to be set apart and the place selected for holding the sales and any changes therein shall be reported for the information of the High Court. (4) The following scale is laid down as to the amount which may be deducted from the proceeds of the sale of the property sold in execution of the decree, as the expenses of sale, and paid to the officer conducting the sale under the orders of the Court as his authorised commission:—When the proceeds of sale do not exceed Rs. 500,—5 per cent. When they exceed Rs. 500 and do not exceed Rs. 5,000,—5 per cent. on the first Rs. 500, and 2 per cent. on the remainder. When they exceed Rs. 5,000,—at the above rate on the first Rs. 5,000, and 1 per cent. on the remainder. The calculation of the commission shall be on the whole amount realised in pursuance of one application for execution. (5) Subject to the provisions of sub-r. 13 of r. 45-B no further sum beyond this authorised commission and the cost of conveyance of property to the place of sale shall be deducted from the sale proceeds. **Note.**—As regards the travelling allowance of Bailiffs going out to sell property on the spot, see Arts. 10, 39 and item 29 of Appendix 20, Civil Service Regulations. (6) When a sale of immovable property is set aside under the provisions of r. 92 (2) below, no commission shall be paid to the Bailiff for selling the property. (7) No officer of a subordinate Court shall receive any larger commission or fee in respect of any sale or property (mortgaged or otherwise) held in execution or pursuance of any decree or order of the Court directing or authorising such sale than that allowed by sub-r. (4) above. (8) The gross proceeds of sales shall be entered in Register II and in Bailiff Register I and shall be paid in the Treasury.

III.—MODES OF EFFECTING SALES.

SALE OF MOVEABLE PROPERTY.—(1) Where moveable property is sold by public auction, the price of each lot shall be paid at the time of sale or as soon after as the officer or other

person holding the sale directs, and in default of payment the property shall forthwith be resold.

(2) On payment of the purchase money, the officer or other person holding the sale shall grant a receipt for the same, and the sale shall become absolute.

(3) Where moveable property to be sold is a share in goods belonging to the judgment-debtor and a co-owner, and two or more persons, of whom one is such co-owner, respectively, bid the same sum for such property or for any lot, the bidding shall be deemed to be bidding of the co-owner. (O. 21, r. 77.)

SCOPE.—The provisions of this rule give the officer conducting the sale of moveable property a discretion to allow the purchase money to be paid at a reasonable time after the sale has taken place. 4 N.W.P. 37.

MOVEABLE PROPERTY.—A money decree is not moveable property. 1924 R. 21—2 Bur. L.J. 151—1 R. 360.

For other cases see *supra*.

SALE OF AGRICULTURAL PRODUCE.—(1) Where the property to be sold is agricultural produce, the sale shall be held,—

- (a) if such produce is a growing crop, on or near the land on which such crop has grown, or
- (b) if such produce has been cut or gathered, at or near the threshing floor or place for treading out grain or the like or fodder stack on or in which it is deposited:

Provided that the Court may direct the sale to be held at the nearest place of public resort, if it is of opinion that the produce is thereby likely to sell to greater advantage.

(2) Where, on the produce being set up for sale,—

- (a) a fair price in the estimation of the person holding the sale, is not offered for it, and
- (b) the owner of the produce or a person authorised to act in his behalf, applies to have the sale postponed till the next day or, if a

market is held at the place of sale, the next market day,

the sale shall be postponed accordingly and shall be then completed whatever price may be offered for the produce. (O. 21, r. 74.)

SPECIAL PROVISIONS RELATING TO GROWING CROPS.—(1) Where the property to be sold is a growing crop, and the crop from its nature, admits of being stored, but has not yet been stored, the day of the sale shall be so fixed as to admit of its being made ready for storing before the arrival of such day and the sale shall not be held until the crop has been cut or gathered and is ready for storing.

(2) Where the crop from its nature does not admit of being stored, it may be sold before it is cut and gathered and the purchaser shall be entitled to enter on the land and to do all that is necessary for the purpose of tending and cutting or gathering it. (O. 21, r. 75.)

ADDITIONAL RULE MADE BY THE LAHORE HIGH COURT.—O. 21, r. 75.—In O. 21, r. 75 (2) after the word "stored" shall be added the words "or can be sold to great advantage in an unripe state, such as green, wheat or gram".

NEGOTIABLE INSTRUMENTS AND SHARE IN CORPORATIONS.—Where the property to be sold is a negotiable instrument or a share in a corporation, the Court may, instead of directing the sale to be made by public auction, authorise the sale of such instrument or share through a broker. (O. 21, r. 76.)

SCOPE.—The purchaser at a court sale of the right, title and interest of a shareholder is not entitled as of right to have his name entered in the register of the company as a share-holder. He is subject to the same rules as a private purchaser is. 41 B. 76. The court is not bound to authorise the sale by a broker. It may do so or not. 8 W.R. 415.

SALE OF DEBT.—If the property of which sale is sought is a debt and the court receives notice from the alleged debtor that no debt exists the court should satisfy itself as to the existence or otherwise of the debt; and if the court is satisfied that no debt exists, it should abstain from proceeding to sale. 4 B. 323. A debt may be sold under O. 21, r. 64 and delivery made of it as prescribed in r. 79. It is only when the garnishee of the third party admits the debt that payment can be ordered to be made to the judgment creditor, and if the former denies the debt, it is open to the judgment-debtor to have it sold or to apply for the appointment of a receiver with power

to sue the garnishee for the recovery of the debt from him. 95 I.O. 469—10 Bur. L.T. 6 (11 B. 448 followed).

SALE OF OTHER MOVEABLE PROPERTY.—In the case of any moveable property not hereinbefore provided for, the Court may make an order vesting such property in the purchaser or as he may direct, and such property shall vest accordingly. (O. 21, r. 81.)

ADDITIONAL RULE MADE BY THE RANGOON HIGH COURT.—O. 21, r. 81-A.—Whenever guns or other arms in respect of which licenses have to be taken by purchasers under the Indian Arms Act, 1878, are sold by public auction in execution of decrees, the court directing the sale shall give due notice to the Magistrate of the District of the names and addresses of the purchasers, and of the time and place of the intended delivery to the purchasers of such arms, so that proper steps may be taken by the police to enforce the requirements of the Indian Arms Act,

ADDITIONAL RULE MADE BY THE ALLAHABAD HIGH COURT.—O. 21, r. 115.—Whenever guns or other arms in respect of which licenses have to be taken by purchasers under the Indian Arms Act (Act No. XI of 1878) are sold by public auction in execution of decrees or order of a civil court, the court directing the sale shall give due notice to the Magistrate of the district of the names and addresses of the purchasers, and of the time and place of the intended delivery to the purchasers, of such arms, so that proper steps may be taken by the police to enforce the requirements of the Indian Arms Act.

SALES OF IMMOVEABLE PROPERTY.

DEPOSIT BY PURCHASER AND RESALE ON DEFAULT.—(1) On every sale of immoveable property, the person declared to be the purchaser shall pay immediately after such declaration a deposit of twenty-five per cent. on the amount of his purchase money to the officer or other person conducting the sale and in default of such deposit, the property shall forthwith be resold.

(2) Where the decree-holder is the purchaser and is entitled to set-off the purchase money under rule 72, the Court may dispense with the requirements of this rule. (O. 21, r. 84).

LEGAL CHANGES.—Sub-r. (2) is new. Under the old Code it was held that the decree-holder to whom the property was knocked down was bound to make the deposit unless all the parties interested in the amount to be deposited waive their right to a cash deposit. W.R. 1864 Mse. 30; 6 O.L.R. 181.

IMMOVEABLE PROPERTY.—A decree charging lands for its satisfaction is immoveable property. 1 A. 348 ; 9 B.H.O. 64 ; but see *supra*.

For other cases of immoveable property see *supra*.

DEPOSIT OF 25 PER CENT. OF THE PURCHASE MONEY.—An officer conducting a Court sale has no authority to extend the time in which the purchaser should deposit 25 per cent. of the purchase money. The deposit should be made immediately and must cover 25 per cent of the purchase money. 2 O.L.J. 216 = 30 I.C. 230. A sale of immoveable property in execution of a decree is not complete until the officer conducting the sale has accepted the final bid and the purchaser has paid the deposit required by O. 21, r. 84. 50 I.C. 914 ; 30 A. 273 ; 15 C.W.N. 350 = 9 I.C. 66 ; 30 I.C. 230 = 2 O.L.J. 216 ; 16 C. 33 ; 3 L.B.R. 225 ; 14 M. 227 ; 28 A. 238.

WHEN IS THE SALE COMPLETE.—Under the old Code the sale was not complete till the confirmation thereof. 8 O.C. 202 ; 7 I.C. 409 = 7 A.L.J. 893. Under the new Code the sale is complete when the property is auctioned and the amount of the 25 per cent. is deposited. 7 I.C. 409 ; 35 A. 65 ; 50 I.C. 914 ; 2 Pat. 548 = 76 I.C. 113. Title of the purchaser dates from the sale. 6 A. 112.

For other rulings see *infra*.

TIME FOR PAYMENT OF THE PRELIMINARY DEPOSIT.—An officer conducting a sale has no authority to extend the time for payment of 25 per cent. of the purchase money. It is to be deposited immediately. 30 I.C. 230 = 2 O.L.J. 216 ; 69 I.C. 1001 = 43 M.L.J. 477.

APPEAL.—An order setting aside a sale in execution of a decree on account of the default of the auction-purchaser in depositing the purchase money is not appealable. 58 I.C. 597.

TIME FOR PAYMENT IN FULL OF PURCHASE MONEY.—The full amount of the purchase money payable shall be paid by the purchaser into Court before the Court closes on the fifteenth day from the sale of the property :

Provided that, in calculating the amount to be so paid into Court, the purchaser shall have the advantage of any set-off to which he may be entitled under rule 72. (O. 21, r. 85.)

SCOPE.—The provisions of this rule are imperative. 25 M. 535 ; 51 I.C. 316. The Post Office is not an agent of the Court and the purchaser must so deposit the amount as to reach the Court in time. 22 B. 415. The time should not be extended without the consent of all the parties concerned. 69 I.C. 1001 = 43 M.L.J. 477 ; 30 I.C. 230 = 2 O.L.J. 216. But the absence of such consent does not render the sale a nullity (*ibid*). When the court is closed on the fifteenth day the payment may be made on the next day on which the Court opens. 18 C. 231 ; also see General Clauses Act X of 1897. 13 M.L.J. 271. The days on which the Court is closed but the office is open are office days. 20 B. 745. Delay in paying the balance of the purchase money does not necessarily make the sale invalid. 79 I.C. 724 = 1924 R. 81.

PROCEDURE IN DEFAULT OF PAYMENT.—In default of payment within the period mentioned in the last preceding rule, the deposit may, if the Court thinks fit, after defraying the expenses of the sale, be forfeited to the Government, and the property shall be resold, and the defaulting purchaser shall forfeit all claims to the property or to any part of the sum for which it may subsequently be sold. (O. 21, r. 86.)

FORFEITURE OF PRELIMINARY DEPOSIT.—Under the present Code the Court has a discretion to forfeit the deposit of 25 per cent. made by the purchaser or not, while under the old Code the Court had no such option. 32 A. 380 ; 25 M. 535. Where the purchaser failed to pay the balance of the purchase money for some good reason, the amount deposited may be refunded to him. 59 I.C. 705 = 17 N.L.R. 15. Where the purchaser deposited a sum much in excess of the 25 per cent. of the purchase money, and before he could deposit the balance, the judgment-debtor got the sale set aside under O. 21, r. 89 and the purchaser did not deposit the balance of the purchase money, it was held that this was a proper case for allowing the refund of the deposit to the purchaser. 32 A. 380. The deposit is liable to be forfeited and paid to the decree-holder under O. 21, r. 71. 48 M.L.J. 335 = 27 Bom. L.R. 806 P.C.

PAYMENT OF THE BALANCE BY ONE OF THE JOINT PURCHASERS.—When A and B deposited the 25 per cent in respect of a sale agreeing to purchase the property in certain shares, but the balance was deposited by B alone, A being unable or unwilling to pay, and immediately after the sale certificate is issued A comes forward and claims to purchase his share of the property ; then the payment by B must be considered to be also on behalf of A ; and A is entitled to purchase his share. 1926 O. 719.

NOTIFICATION ON RE-SALE.—Every resale of immoveable property in default of payment of the purchase money within the period allowed for such payment, shall be made after the issue of a fresh proclamation in the manner and for the period hereinbefore prescribed for the sale. (O. 21, r. 87.)

SCOPE.—The provisions of O. 21, r. 87 do not apply in case of resale under O. 21, r. 84 when the property is put up again and sold forthwith and no date is appointed for a resale. 2 O.W.N. 411. The action of the Court in setting aside the sale and then proceeding to sell the property without a fresh proclamation is illegal. 25 P.R. 1907. The rule applies to a re-sale in default of payment of the purchase money within the period allowed for such payment and not to a postponed sale. 1 W.R. Mis. 3 ; 25 W.R. 34. A fresh proclamation is not prescribed in the case of every re-sale, but only when the re-sale is in default of payment of the purchase money within the time allowed. 12 M. 454.

BID OF CO-SHARER TO HAVE PREFERENCE.—Where the property to be sold is a share of undivided immoveable property and

two or more persons of whom one is a co-sharer respectively bid the same sum for such property or for any lot, the bid shall be deemed to be the bid of the co-sharer. (O. 21, r. 88.)

OBJECT AND SCOPE.—The object of O. 21, r. 88 is to enable co-sharers to keep out strangers if they so desire. The rule is only intended for the sake of pre-emptors, and lays down one simple rule that any one co-sharer of the undivided property of which a share is sold is entitled to pre-empt that share when the highest bid is made by a stranger. 2 A.L.J. 1148=26 I.C. 95. Except is provided in this rule there is no pre-emption in property sold in execution. 10 W.R. 165=1869 Marsh 555; and also Local Acts. The defeasible title to a share in a patti does not give a right to pre-empt another share in the same patti as co-sharer. 35 A 296; 32 A. 45. O. 21, r. 88 contemplates a distinct bid by the co-sharer in the ordinary manner of offering bids before the property is knocked down. A.W.N. (1888) 208; 3 O.L.J. 405=36 I.C. 656. B and T bid at an auction of certain property put up for sale in execution of a decree. T asserting himself to be a co-sharer capped each bid with a bid correspondingly equal to value intending to exercise his preferential right as a co-sharer. When the matter came up before the Collector T was absent though served and the sale was confirmed in favour of B. Under the circumstances T was not competent to bring a suit for possession. 45 A. 203. This rule does not apply when the property sold is not a share of undivided property but only the interest of a mortgagee in such a share. 3 A. 15; 41 M. 582. A co-sharer in undivided property must bid as high as a stranger in order to enable him to avail of the provisions of this rule 2 A. 850; 1881 P.J. 50; 3 A. 827; 36 I.C. 656=3 O.L.J. 405.

ENFORCEMENT OF RIGHT OF PRE-EMPTION.—The claimant should sue to set aside the order of the Court confirming the sale in favour of a stranger auction-purchaser and to have himself declared entitled to pre-emption of the property and to be substituted for the auction-purchaser. 7 N.W.P. 97. Where the auction-purchaser's claim to pre-emption is disallowed under this rule, he cannot maintain a suit for possession against the successful pre-emptor. He can only sue for a declaration that the latter has no right of pre-emption and that the sale to him is invalid. 1 A. 272. The auction-purchaser claimant cannot obtain possession until the sale in his favour has been confirmed by the executing Court. (*ibid*). If the claimant has fulfilled the conditions of sale the Court executing the decree is bound to give effect to the right of pre-emption. 6 N.W.P. 272.

PERSONS HAVING RIGHT OF PRE-EMPTION UNDER THE RULE.—Only those who are co-sharers or co-parceners at the time of sale can claim pre-emption. 6 N.W.P. 289; 6 N.W.P. 243. All the members of a joint Hindu family whether they are recorded in the Collector's register or not are co-sharers. 7 A. 184. A Hindu widow holding her deceased husband's share by inheritance is a co-sharer. 1 A. 452. When the widow is in possession for maintenance she is not a co-sharer. 6 A. 17.

APPEAL.—A co-sharer, not a party to the suit, has no right of appeal from an order confirming the sale in favour of another person. 3 A. 674; but see 5 A. 42. An appeal does not lie from an order refusing to restore to the file an application dismissed for default of appearance. 29 A. 596.

ADDITIONAL RULE MADE BY THE ALLAHABAD HIGH COURT.—O. 21, r. 106.—When the property which it is sought to bring to sale is immoveable property within the definition of the same contained in the law for the time being in force relating to the registration of documents, the decree-holder shall file with his application a certificate from the sub-registrar within whose sub-district such property is

situated showing that the sub-registrar has searched his books Nos. I and II and their indices for the past twelve years, and stating the encumbrances, if any, which he has found on the property.

O. 21, r. 109.—The certificate of the sub-registrar shall be open to the inspection of the parties or their pleaders free of charge, between the time of the receipt by the Court and the declaration of the result of the enquiry.

O. 21, r. 107.—Where an application is made for the sale of land, or of any interest in land, the Court shall before ordering sale thereof, call upon the parties to state whether such land is or is not ancestral land within the meaning of Notification No. 1887/1-238-10, dated 7th October, 1911, of the local Government and shall fix a date for determining the said question. On the day so fixed, or on any date to which the enquiry may have been adjourned, the Court may take such evidence, by affidavit or otherwise, as it may deem necessary, and may also call for a report from the Collector of the District as to whether such land or any portion thereof is ancestral land. After considering the evidence, and the report, if any, the Court shall determine whether such land, or any, and what part of, it is ancestral land. The result of the enquiry shall be noted in an order made for the purpose by the presiding Judge in his own handwriting.

O. 21, r. 109.—The report of the Collector shall be open to the inspection of the parties or their pleaders free of charge, between the time of the receipt by the Court and the declaration of the result of the enquiry. No fees are payable in respect of the report by the Collector.

O. 21, r. 131.—Nothing in rr. 104—130 of O. 21 shall be deemed to prevent the Court from issuing and serving on the judgment-debtor simultaneously the notices required by O. 21, rr. 22, 66 and 107.

O. 21, r. 132.—For the purpose of all proceedings under this order service on any party shall be deemed to be sufficient if effected at the address for service, referred to in O. 8, r. 11, subject to the provision of O. 7, r. 24.

O. 21, r. 108.—When the property which it is sought to bring to sale is revenue paying or revenue free land or any interest in such land, and the decree is not sent to the Collector for execution under S. 68, the Court, before ordering the sale, shall also call upon the Collector in whose district such property is situate to report whether the property is subject to any (and if so, to what) outstanding claims on the part of Government.

O. 21, r. 109.—The report of the Collector shall be open to the inspection of the parties or their pleaders, free of charge, between the time of the receipt by the Court and the declaration of the result of the enquiry. No fees are payable in respect of the report by the Collector.

O. 21, r. 112.—The costs of the proceedings under rr. 66, 106 and 108 shall be paid in the first instance by the decree-holder; but they shall be charged as part of the cost of the execution, unless the Court for reasons to be specified in writing shall consider that they shall either wholly or in part be omitted therefrom.

SALE WHEN TO BECOME ABSOLUTE OR BE SET ASIDE.—(1) Where no application is made under rule 89, rule 90 or rule 91, or where such application is made and disallowed, the Court shall make an order confirming the sale, and thereupon the sale shall become absolute.

(2) Where such application is made and allowed, and where in the case of an application under rule 89, the deposit required by that rule is made within thirty days from the date of sale, the Court shall make an order setting aside the sale :

Provided that no order shall be made unless notice of the application has been given to all the persons affected thereby.

(3) No suit to set aside an order made under this rule shall be brought by any person against whom such order is made (O. 21, r. 92.)

DISCRETION OF THE COURT IN CONFIRMATION.—The Court has inherent power to refuse to confirm an execution sale if it is satisfied that it was misled either in giving leave to bid or in fixing the real price. In order to show that the Court is misled it is necessary to show either actual misstatement to the Court or non-disclosure to the Court of relevant facts unknown to the Court which it was the duty of the party to bring to the notice of the Court. 46 M. 583 ; 23 M. 217. When a decree is satisfied otherwise after sale but before confirmation thereof, the sale cannot be confirmed after satisfaction is notified to the Court. 18 N.L.R. 134=65 I.C. 331 ; 27 I.C. 601. If the sale is not set aside under O. 21, r. 92, the Court is bound to confirm the sale. 20 C. 8 P.O. ; 54 I.C. 928 ; 31 C. 1011=9 C.W.N. 193 ; 3 Mys. L.J. 52 ; 3 R. 132 ; 1926 N. 193=91 I.C. 962. The purchaser at an execution sale has no absolute right to have confirmation of sale when there is an irregularity in publication or conduct of the sale. 38 M. 387. The Court executing the decree must be satisfied not only that the sale was good, but that there was before it a subsisting decree with the execution of which it ought to proceed by granting confirmation. A Court executing a decree, having a direct notice that the decree in execution of which a sale had taken place, had been set aside on appeal, ought not to make an order confirming the sale. 10 A. 83 ; 24 C.W.N. 73. A sale which has been set aside as against one of the several defendants cannot be confirmed in its entirety but only against the shares of the other defendants. 61 I.C. 571. The fact that the property sold is destroyed by accident or an act of God after the sale but before its confirmation does not entitle the executing Court to refuse confirmation, even under its inherent powers. But if the sale is vitiated at its inception the Court has a discretion to refuse confirmation. 1926 N. 17=88 I.C. 693.

WHAT AMOUNTS TO CONFIRMATION.—In the absence of a certificate the Court's confirmation may sometimes be inferred from the nature of the action taken by it on the receipt of report of sale. 81 P.R. 1915. When an application under r. 90 is dismissed it amounts to confirmation of sale. 79 I.C. 351=3 Pat. 947.

EFFECT OF CONFIRMATION.—There is more than a contract for sale in the interval between an execution sale and its confirmation. There is an inchoate transfer of title which only requires to be perfected by confirmation, not that pending confirmation there is merely a contract for sale ; but a sale does actually take place which must be set aside if not made absolute. So that where a second execution sale takes place after a prior sale which though not confirmed has not been set aside, there would be nothing left to pass by the second sale. 12 C. 597 ; 17 B. 375 ; 15 C. 546 ; 2 C.W.N. 589 ; 16 M.I.A. 529.

PAYMENT TO DECREE-HOLDER BEFORE CONFIRMATION OF SALE.—

A decree-holder may take out the purchase money before the date of confirmation of sale. But the Court has discretion in refusing payment to the decree-holder of the purchase-money before such date. 12 C. 252 ; 6 B. 16.

NOTICE.—The notice referred to in the proviso to clause (b) of r. 92 need not be given within the 30 days mentioned in the rule. 37 B. 387.

CERTIFICATE TO PURCHASER.—Where a sale of immoveable property has become absolute, the Court shall grant a certificate specifying the property sold, and the name of the person who at the time of sale is declared to be the purchaser. Such certificate shall bear date the day on which the sale became absolute. (O. 21, r. 94.)

SCOPE.—The provisions of this rule are mandatory. 1 Pat. L.J. 446 = 38 I.C. 576.

Release by *benami* purchaser in favour of the beneficiary.—A document whereby a *benami* purchaser at a Court auction renounces his claim to the property purchased without conveying any title thereto is a release deed, pure and simple, and not an assignment of the rights of the releaser, and a person claiming under such a document cannot be regarded as himself the purchaser by the purchase certificate by the Court, treating the name of the *benamidar* as a mere alias for him. (1916) 1 M. W.N. 184 = 33 I.C. 1000. The person who is declared to be the purchaser after the bids are concluded is the person in whose name the certificate is to be granted. 24 C.W.N. 27 = 54 I.C. 726 ; 34 M. 149 ; (1916) M.W.N. 184. The representative of the deceased purchaser may be given the certificate. 24 B. 120.

APPLICABILITY.—Where a Court authorises a trustee, a receiver or other person holding property to sell the property and the sale is made out of Court, the court while authorising or directing the sale does not make any title to the purchaser and in such a sale the Court does not grant a sale certificate, nor does it confirm the sale. 16 O.W. N. 394 = 6 I.C. 300.

CONTENTS OF THE SALE CERTIFICATE.—Claims in respect of property admitted by the parties or established by the decree-holder are to be entered in the sale-certificate. 9 B. 47 ; 15 B. 532. The incumbrances noted in the proclamation of sale should not necessarily be entered in the sale certificate unless they have been admitted by the parties or established by the decree or admitted under O. 21, r. 62 to be charges on the property and it is sold subject to them. But if they have thus been admitted, they should be so entered and computed as part of the purchase-money. 18 B. 175 F.B.

CONSTRUCTION OF SALE CERTIFICATE.—The test in construing a sale certificate is what did the Court intend to sell and what did the purchaser understand he bought, and not what the intention of the decree-holder, who was selling the property, was. 38 I.C. 451 = (1918) Pat. 333 ; (1918) Pat. 5 = 43 I.C. 534 ; 41 O. 490 ; 10 M. 241. The property sold is what is described in the proclamation of sale. 27 B. 334. The Court should not go behind a sale certificate to construe it or to contradict its terms. 22 W.R. 181. When there is no ambiguity in the wording of the certificate, the Court cannot construe the document with reference to other documents and to put a limited construction upon the extent of the property referred to in the certificate.

68 I.C. 709—(1921) M.W.N. 374. Where in execution of a mortgage decree against the mortgagor who had mortgaged the entire 16 annas share in the Zamindari with all the appurtenances, the entire 16 annas share was sold, held that the sale was not exclusively of the shares in the groves. 41 A. 45. A sale certificate will not be invalidated by a mere inaccuracy of language or misdescription. The intention of the parties must be given effect to. 7 W.R. 245. The questions as to what the Court intended to sell and what the purchaser understood that he bought, are questions of mixed law and fact and must be determined according to the evidence in each particular case and the construction of the sale proceedings. 27 M. 131; 19 C.L.J. 182. Extraneous evidence can be received to identify the subject of sale described in the sale certificate. 25 W.R. 401. When the identity of the land is not in dispute, the fact that the right transferred by the sale certificate is misnamed is no obstacle in the way of giving possession to the purchaser. 19 W.R. 276. A mere misdescription does not defeat the purchaser's rights. 15 W.R. 490; 21 W.R. 93. When the sale certificate referred only to the lease, the right to the mesne profits awarded by the original decree did not pass by the sale. 6 O. 213. The statement in the sale certificate that the property is sold, with a notice of a claim that it is liable to a charge cannot be accepted as conclusive evidence, as against the purchaser of the binding nature of the charge. 16 M. 207. When all the rights, title and interest of the judgment-debtor's legal representative were sold, the possession with right of mesne profits being sold to some other person, it was held that the latter rights did not pass by the sale certificate. 6 C. 213. The boundaries mentioned in the certificate must prevail over the area. 22 I.C. 26—18 C.L.J. 541; 14 M.L.J. 14. Where a sale certificate did not contain the boundaries, the estate being described by its names only the purchaser takes what comprised that estate at the date of sale. 61 I.C. 91—32 C.L.J. 402. Where in a sale certificate relating to several plots of land, a general description of the whole area sold is given, and not the boundaries of each plot, the *paimash* and survey numbers of the plots must be considered to give the identity of the land sold and not the boundaries. 13 I.C. 324—22 M.L.J. 161. The property described in the proclamation of sale is what is sold at a judicial sale. 41 C. 590 P.C. Where the descriptions of the property given in the proclamation of sale and the sale certificate are conflicting, the descriptions given in the former are of superior authority, while dealing with the claims of innocent third parties whose rights are affected by such descriptions. 1 C.L.R. 460; 3 Mys. L.J. 17. It is open to the parties to show that the certificate does not describe what was actually sold or that the property sold is different from the property mentioned in it. 16 M. 207; 27 B. 334. Where certain portions of a joint impartible Zamindari were sold in 1873 and 1876 in execution of money decrees against the Zamindar for debts for which the estate was not liable, the parties were taken to be governed by the law as it stood at the time of sale and not by subsequent ruling of Courts overruling that law and it was held that only the life interest of the Zamindar passed under the sale. 27 M. 131 P.C.

ALTERATION OF CERTIFICATE.—A Court has no jurisdiction to amend a certificate of sale so as to show the purchase of a larger share of the property than what was stated in the proclamation of sale. 18 I.C. 725; 46 I.C. 903. A Court is not competent to make an order *ex parte* amending the sale certificate. 23 W.R. 301. When in a proclamation of sale of immoveable property in execution of a decree, the *towzi* number of the property is incorrect the Court may, on the application of the auction-purchaser, and after hearing the objection of the opposite party, correct the sale certificate by substituting therein the correct *towzi* number for the number therein stated. 20 I.C. 725. A Court has inherent jurisdiction to amend a sale certificate which describes the property sold incorrectly. 19 C.L.J. 209; 26 C. 529; 23 A. 476; 20 M. 487; 38 M. 387; 39 C.L.J. 222—28 C.W.N. 403. No appeal lies from an order refusing to amend a sale certificate. 23 A. 476. The particulars given in a sa

certificate cannot be corrected by reference to the boundaries given in the plaint. 46 I.C. 203.

DRAWING UP OF SALE CERTIFICATE, IF A JUDICIAL ACT.—When a sale has been confirmed, it is the duty of the Court to grant a sale certificate to the purchaser. But in mere drawing up a certificate to be given to the purchaser, there is no judicial order passed on any party. If a question be raised as to what the certificate should contain on account of a dispute between the parties and the question is adjudicated upon by the Court, the order passed by the Court would be a judicial order. 23 M.L.J. 97=14 I.C. 286.

APPLICATION FOR SALE CERTIFICATE.—It is the imperative duty of the Court to grant a certificate of sale and the Code does not impose on the purchaser the duty of making an application as a condition precedent to the issue of the certificate. 4 M. 172 ; 6 B. 586 ; 30 M. 415 ; 9 A. 364 ; 7 A. 316 ; 8 A. 519 ; 3 A.W.N. 262 ; (*contra* in 5 B. 202 and 5 B. 206).

COURT-FEES ON AN APPLICATION FOR SALE CERTIFICATE.—The O.P. Code does not require an application for a sale certificate from an auction-purchaser. Such an application need not bear any stamp. 13 B. 670.

REGISTRATION OF SALE CERTIFICATE.—A sale certificate is not an instrument creating, limiting or extinguishing title. It is an act of Court exhibiting the assent of the Court to the sale which in effect transferred, what title the owner had, to the purchaser, such a transfer to take effect on the granting of the certificate. The holder of a registered certificate has no preference over a purchaser under an earlier unregistered sale-deed which was optionally registrable. 7 M. 418 ; 9 C. 82 F.B. ; 5 A. 568 F.B. ; 142 P.R. 1908 F.B. Under the provisions of Act VIII of 1859, the old Code of O.P. a sale certificate was required to be registered. 3 M. 37 F.B. ; 9 B. 472 ; 2 A. 892. A sale certificate is not a document of such a character as to be entitled by law to any priority by virtue of its being registered over an unregistered lease. 3 B.H. C.A.C. 367.

RIGHTS UNDER THE SALE CERTIFICATE.—A certificate of sale is not conclusive as to the property sold. As regards parties to the suit or persons claiming under them the certificate is conclusive as to the date from which the property sold actually vests in the purchaser. 27 B. 334 ; 6 Bom. L.R. 864 ; 31 C. 380. A sale certificate is a valid transfer even if the execution of the decree was barred at the time of sale. 11 C. 376 (7 C. 91 and 8 C. 51 followed.) An auction-purchaser is not bound by a statement as to the situation of the land purchased. 52 I.C. 739. A certificate of sale to an auction-purchaser confers on him no right to require the later mortgagees or those purchasing under them as auction-purchasers to return the money he paid either personally or out of the property. 3 Bom. L.R. 92. A statement in a sale certificate that the purchase is subject to a mortgage is not conclusive evidence against the purchaser. 16 M. 207.

Several purchasers.—Several purchasers under a certificate of sale are entitled to share equally in the property purchased unless otherwise stated therein. 4 O.W. N. 465.

STAMP DUTY.—Claims in respect of property admitted by the parties or established by the decree passed by a court is to be entered in the certificate of sale and computed as part of the purchase-money for the purpose of stamp duty. 9 B. 47 ; 15 B. 532. The Stamp duty payable on a certificate of sale is governed by Cl. (16) Sch. I of the Stamp Act. 5 M. 18 F.B. ; 10 C. 92.

LIMITATION FOR GIVING A SALE CERTIFICATE.—A sale certificate granted more than 3 years after the confirmation of sale would be valid and not open to objection on the ground of its having been applied for more than 3 years after confirmation of sale, as it is the duty of the Court to issue a sale certificate. 8 B. 377 ; 4 M. 172 ; 6 C.W.N. 190 ; 12 C. 542 ; 10 A. 350 ; 19 C. 132 ; 22 C. 425 ; 20 B. 543 ; 31 M. 71 ; 57 P.R. 1908 ; 8 A. 492 ; 13 A. 78 ; 30 B. 415 ; 9 A. 364. There is no limitation for obtaining a sale certificate. 6 B. 586 ; 4 M. 172 ; 30 B. 415 ; A.W.N. (1883) 262 ; 7 B. 316 ; 8 A. 519 ; 5 I.O. 263. *Contra* was held in 5 B. 202, that Art. 178 applied to an application for granting of the certificate.

ISSUE OF A FRESH SALE CERTIFICATE.—A Court having once issued a sale certificate is under no obligation to give him another for the sole purpose of evading the penalty which he has incurred by not having presented in the first instance to the Court a paper properly stamped for it. 9 B. 526.

A SALE CERTIFICATE IS MERELY A PIECE OF EVIDENCE.—A certificate of sale is not essential to complete title of an auction-purchaser. 10 B. 444 ; 7 A.L.J. 893. A certificate of sale is little more than evidence of title. 47 C. 1108 ; 81 P.R. 1915 ; 7 C. 199 ; 9 P.R. 1903 ; 9 C. 842 ; 5 A. 305 ; 43 C. 124 ; 11 M. 296 ; 7 C.L.J. 384 ; 25 W.R. 401 ; (*contra* in A.W.N. (1882) 106) ; 3 Mys. L.J. 17 ; 18 W.R. 157 ; 27 B. 379 ; 1 I.O. 62—9 C.L.J. 346. A certificate does not create title, but is merely evidence of title. 47 C. 1108 ; 7 M. 418 ; 84 I.O. 98. A purchaser of immovable property at execution sale can establish his title independently of the sale certificate. A sale certificate is not the title, but merely the title deed. 7 C.L.J. 384 ; 27 B. 379 ; 5 A. 305. The effect of grant of a sale certificate is to create statutory evidence of the transfer, and it is not necessary to pass title. 5 M. 54. A sale certificate of sale merely records what has been sold. 43 C. 124.

Proof of sale.—A purchaser in auction sale need not prove the sale certificate if the auction-purchase is proved or admitted. 11 M. 296 ; 7 C.L.J. 384 ; 9 P.R. 1903. Where a Court sale is confirmed, the purchaser's failure to obtain a sale certificate from the Court does not vitiate his title. 25 I.O. 8 ; 5 A. 305 F.B. ; A.W.N. (1894) 34 ; 12 C. 169 ; 11 M. 296 ; 17 B. 375. A sale certificate is a public document of title. Secondary evidence of it is admissible under S. 65 (e) of the Evidence Act. 2 Bom. L.R. 533.

APPEAL.—An appeal against an order refusing to grant a sale certificate to the decree-holder purchaser does not lie. 7 C.L.J. 436. An appeal does not lie from the order refusing to amend the certificate of sale. 23 A. 476. No appeal lies from an order granting a review and directing the amendment of the certificate of sale. 26 C. 529.

ADDITIONAL RULES MADE BY THE RANGOON HIGH COURT.—O. 21, r. 94-A.—A copy of every sale certificate issued under r. 94 shall be sent forthwith to the sub-registrar within whose sub-district the land sold or any part thereof is situate.

O. 21, r. 94-B.—If in execution of a decree, any interest in land is sold, the names and addresses of the purchaser or purchasers and the interest thereby acquired shall be certified to the Superintendent of Land Records as soon as the sale has been confirmed under r. 92 (1).

ADDITIONAL RULE MADE BY THE ALLAHABAD HIGH COURT.—O. 21, r. 114.—Whenever any Civil Court has sold, in execution of a decree or other order, any house or other building situated within the limits of a military cantonment, or station, it shall, as soon as the sale has been confirmed, forward to the commanding officer of such cantonment or station for his information and for record in the Brigade

or other proper office, a written notice that such sale has taken place, and such notice shall contain full particulars of the property sold and of the name and address of the purchaser.

IV.—PROCEDURE IN SALES.

POSTPONEMENT OF SALE TO ENABLE JUDGMENT-DEBTOR TO RAISE AMOUNT OF DECREE.—(1) Where an order for the sale of immoveable property has been made, if the judgment-debtor can satisfy the Court that there is reason to believe that the amount of the decree may be raised by the mortgage or lease or private sale of such property or of some part thereof or of any other immoveable property of the judgment-debtor, the Court may, on his application, postpone the sale of the property comprised in the order for sale on such terms and for such period as it thinks proper, to enable him to raise the amount.

(2) In such a case the Court shall grant a certificate to the judgment-debtor authorising him within a period to be mentioned therein and notwithstanding anything contained in section 64 to make the proposed mortgage, lease, or sale :

Provided that all monies payable under such mortgage, lease or sale shall be paid not to the judgment-debtor, but, save in so far as a decree-holder is entitled to set off such money under the provisions of rule 72, into Court :

Provided also that no mortgage, lease or sale under this rule shall become absolute until it has been confirmed by the Court.

(3) Nothing in this rule shall be deemed to apply to a sale of property directed to be sold in execution of a decree for sale in enforcement of a mortgage or charge on such property. (O. 21, r. 83.)

SCOPE.—The provisions of O. 21, r. 83 apply to cases before an auction sale and not after a property is sold at auction. 92 P.R. 1907 ; 72 P.R. 1910. In authorising a sale under O. 21, r. 83, a Court cannot empower a judgment-debtor to transfer a higher interest than he has and bind the interest of others in the property. 26 B. 879. The provisions of O. 21, r. 83 do not apply to a sale of property directed to be sold in execution of a decree for sale in enforcement of a mortgage or charge on such property.

the reason being that in case of a mortgage decree, the right of sale does not depend on attachment in execution but is conferred by the decree itself. 5 L. L.J. 67 ; 118 P.L.R. 1920=55 I.O. 816 ; 6 M.L.J. 187 ; 1 O.L.R. 295. A Court acting under this rule, can neither grant a certificate nor confirm an alienation of property unless it appears that by such alienation the decree will be satisfied in full. 14 M. 277 ; W.R. 1864 Mis. 5. This is an enabling rule and qualifies the prohibition contained in S. 64 ; and a private alienation becomes absolute even against all claims under the attachment. 30 B. 337. Postponement is a matter of discretion. 11 O. 244. Postponement should not be allowed unless the Court is satisfied that the judgment-debtor will be in a position to satisfy the demand and that the creditor would not be put to a loss. 15 W.R. 477 ; 17 W.R. 193.

SALE OF A MINOR'S PROPERTY UNDER O. 21, r. 83.—When an application is made to the executing Court to sanction an intended transfer under O. 21, r. 83, the fulfilment of the requirements of S. 29, Guardians and Wards Act is not rendered unnecessary, which requires the sanction of the District Judge to the sale. 36 C.L.J. 326 ; 23 B. 287 ; 31 A. 378 ; 49 O. 911.

Permission by a guardian of a minor judgment-debtor.—A permission obtained from the Court executing the decree under O. 21, r. 83, to sell the property of the minor is not sufficient and a guardian must obtain the sanction of the District Judge in spite of such permission. 31 A. 378.

PERIOD OF POSTPONEMENT.—This rule does not authorise the stay of sale for one year. 2 N.W.P. 1 ; 17 W.R. 192. Where the debt can be cleared off by sale, mortgage, etc., of property within six months, a Receiver may be appointed. 15 W.R. 322.

PERMISSION TO SELL OBTAINED BY ONE CO-SHARER JUDGMENT-DEBTOR.—Where the equity of redemption in a certain property was held by two divided brothers in equal shares and the same was ordered to be sold in execution of a decree against both and the senior brother obtained leave to sell privately under O. 21, r. 83, held that the senior brother had no power to sell his junior brother's interest and the latter is entitled to recover his half-share from the purchaser on payment of half the price paid by the purchaser. (1919) M.W.N. 611=52 I.O. 956. A private alienation under this rule does not affect the share of another judgment-debtor but only of that who obtained the permission. 26 B. 379.

PERMISSION IN CASE OF RIVAL DECREE-HOLDER.—Courts should not grant permission to raise money by private alienation to satisfy only one of the decrees against the judgment-debtor when there are more decrees than one against him and all the decree-holders have attached and seek to sell the judgment-debtor's property in execution. When permission is granted to raise money by private alienation such money is paid under a pending application and is assets under S. 73. 41 M. 616.

PAYMENT INTO COURT.—Payment to a judgment-creditor's pleader under the order of the Court is payment into Court within the meaning of the first proviso of r. 83 (2). The pleader in such a case is made the agent of the Court to receive the money. 21 I.O. 210.

RIGHT OF PRE-EMPTION WITH RESPECT TO THE SALE.—A sale by the judgment-debtor under O. 21, r. 83 is not a sale in execution of the decree so as to debar the right of pre-emption, 52 I.O. 337=1 L. L.J. 101.

GRANTING OF CERTIFICATE.—The granting of the certificate does not make the alienation an act of the Court. 23 B. 287. The effect of the certificate is to authorise

the judgment-debtor to alienate property while under attachment which would otherwise be void. 23 B. 287. The sale is a private sale and the lien of a prior incumbrancer over the property remains wholly unaffected by it. 1924 L. 182=76 I.C. 529.

CONFIRMATION BY THE COURT.—It is not necessary that any formal application should be made for the purpose of obtaining the Court's confirmation of a private transfer, nor is there any provision under which a formal order declaring such confirmation should be recorded. When a Court directs a private purchaser to pay the purchase money to the decree-holder, and makes no objection to the sale, it in effect confirms the sale. 21 I.C. 210. A vendee whose sale is not confirmed under O. 21 r. 88 cannot maintain a suit for possession against a subsequent vendee whose sale is also not confirmed. A.W.N. (1882) 243. Where the property is attached under the order of more Courts than one and the certificates have been granted by all of them, the order of confirmation passed by one of them is sufficient. 19 B. 539. A purchase which has received the sanction of the Court may be set aside on the ground of fraud if the sanction of the Court is obtained by misrepresentation or by withholding of the material information. 29 B. 615.

DECREE FOR ENFORCEMENT OF A MORTGAGE OR CHARGE.—The provisions of this rule do not apply to a sale of property directed to be sold in execution of a decree for sale in enforcement of a mortgage or charge. Sub-rule (3). 118 P.L.R. 1920=55 I.C. 816 ; 3 O. 335 ; 18 L.W. 615=46 M.L.J. 71. The contrary view under the old Code in 25 B. 104 and 25 M. 244 is no longer good law.

APPEAL.—An order refusing to postpone a sale is an interlocutory order and no appeal lies therefrom. 46 M.L.J. 71=(1923) M.W.N. 894.

PROCLAMATION OF SALE BY PUBLIC AUCTION.—(1) Where any immoveable property is ordered to be sold by public auction in execution of a decree, the Court shall cause a proclamation of the intended sale to be made in the language of such Court.

(2) Such proclamation shall be drawn up after notice to the decree-holder and the judgment-debtor, and shall state the time and place of sale and specify as fairly and accurately as possible—

- (a) the property to be sold ;
- (b) the revenue assessed upon the estate or part of the estate where the property to be sold is an interest in an estate or part of an estate paying revenue to the Government ;
- (c) any incumbrance to which the property is liable ;
- (d) the amount for the recovery of which the sale is ordered ; and

(e) every other thing which the Court considers material for a purchaser to know in order to judge of the nature and value of the property.

(3) Every application for an order for sale under this rule shall be accompanied by a statement signed and verified in the manner hereinbefore prescribed for the signing and verification of pleadings and containing so far as they are known to or can be ascertained, by the person making the verification, the matters required by sub-rule (2) to be specified in the proclamation.

(4) For the purpose of ascertaining the matters to be specified in the proclamation the Court may summon any person whom it thinks necessary to summon and may examine him in respect to any such matters and require him to produce any document in his possession or power relating thereto. (O. 21, r. 66.)

SCOPE AND OBJECT.—The object of issuing a proclamation is to give notice to the intending purchasers and not to the judgment-debtors. 12 W.R. 488 ; 18 W.R. 56. A notice is required to be given to the decree-holder and the judgment-debtor before drawing up of proclamation. 37 I.O. 872=2 Pat. L.J. 130 ; 36 P.W.R. 1919=49 I.O. 539. The action of the Court in settling the terms of a proclamation is a judicial act. 36 P.W.R. 1919 ; 37 I.O. 872=2 Pat. L.J. 130 (*contra* in 27 M. 259 ; 46 M.L.J. 71 ; it is a ministerial act).

APPLICATION FOR SALE.

DEFECT IN SIGNATURE AND VERIFICATION.—An objection as to defect of signature or verification in the petition under O. 21, r. 66 (3) must be raised within the time fixed by the notice under r. 66. After the filing of the valuation affidavit and the order for sale, the judgment-debtor cannot be permitted to object. 1 Pat. L.T. 647=59 I.O. 282. The omission to make an application is not a material defect and does not vitiate subsequent proceedings. 11 P.L.R. 1917 ; 28 A. 244 ; 87 I.O. 413=1925 M. 1142 ; 29 C.W.N. 556. The verification of the application need not be by the decree-holder, it may be by any person acquainted with the facts of the case. 59 I.O. 282.

AMENDMENT OF APPLICATION.—Where a sale of several properties lot was disallowed and the sale set aside, the decree-holder could apply for amendment of his application for sale of properties separately. 3 U.P.L.R. (A.) 52.

ENQUIRY.—It is competent to a Court to issue a sale proclamation before objections filed by the judgment-debtor had been judicially disposed of, although it may be that the property cannot be sold until the objections put forth are disposed of. 43 I.O. 450. When in the execution proceedings for the sale of an attached holding the Court allowed the application of objector to stand over and in the meantime held the sale

without making inquiries into the objections made by the judgment-debtor, held that the proceedings of the Court were wholly irregular, the proper procedure in such cases for the judgment-debtor is to appeal against the order refusing to postpone the sale or directing the sale to take place. 29 I.C. 616. It is not incumbent on the Court to make an elaborate enquiry into the market value of the property to be sold, to record evidence and to come to a decision on the point. 31 O. 922. It cannot be laid down generally that in no case should any enquiry be made as to the value of the judgment-debtor's property before issuing the sale proclamation. 12 O.W.N. 542. The enquiry under O. 21, r. 66 is intended to be of a summary character. 14 C.L.J. 541; 4 B. 323; 10 M. 194; 51 I.C. 750. A Court has no jurisdiction to fix the valuation on a sale proclamation before the day fixed for hearing the parties as to the proper valuation. 1923 P. 102. When a judgment-debtor is duly apprised of the date fixed for settling the details of the sale proclamation and he fails to attend, he is subsequently debarred from contesting in an application to set aside a sale that the value entered in the sale proclamation was inadequate. 78 I.C. 727. The Court is bound to do what it can to secure the accuracy of the information contained in the proclamation of sale and ought not to trust for such information to persons whose knowledge is obviously not at first hand. A.W.N. (1901) 167. An objection raised in the course of an enquiry under this rule is not within the scope of O. 21, r. 58. 14 B. 369; 8 O.W.N. 264. The result of proceedings under r. 66, preparatory to the publishing of the sale proclamation, is not conclusive between the parties, nor is it binding on the auction-purchaser. 43 A. 489; 88 I.C. 332; 87 I.C. 953; 36 O. 323 P.C.

ADDITIONAL RULE MADE BY THE ALLAHABAD HIGH COURT.—O. 21, r. 110. The result of the enquiry under r. 66 shall be noted in an order made for the purpose by the presiding Judge in his own handwriting. The Court may in its discretion adjourn the enquiry, provided that the reasons for the adjournment are stated in writing and that no more adjournments are made than are necessary for the purposes of the enquiry.

O. 21, r. 111—If, after proclamation of the intended sale has been made, any matter has been brought to the notice of the Court which it considers material for purchasers to know, the Court shall cause the same to be notified to intending purchasers when the property is put up for sale.

Cl. (a).—The notification of sale should contain a statement of the property to be sold. When the property consists of several shares in different *pattis*, the notification should specify the number of shares to be sold in each *patti* and the revenue on such shares. A.W.N. (1887) 50; 21 C. 66. A misdescription of property is a material irregularity. 6 O.W.N. 246. If the property to be sold is the occupancy holding, it should be noted in the proclamation of sale. 27 A. 684. A plan of the house to be sold is not necessary. 60 I.C. 271.

Cl. (b).—An objection on the ground that the revenue was not mentioned in the proclamation of sale cannot be entertained for the first time in appeal. 9 O. 656 P.C. For the effect of non-compliance with the provisions of the clause, see *infra* "Irregularities".

Cl. (c).—O. 21, r. 66 imposes on the Court the duty of stating fairly and accurately, for the information of would-be purchasers, the incumbrances on the property. An order passed by a Court in the course of an enquiry under O. 21, r. 66 is not conclusive as between the decree-holder or purchaser on the one hand and the holder of the incumbrance on the other. 3 O.L.J. 422—36 I.C. 732; 51 I.C. 750—(1919) 3 U.B.R. 139; 28 A. 418. The person applying for execution must disclose to the Court his own lien on the property, otherwise the property will be sold free from the said lien. 22 B. 686; 15 M. 412; 10 C. 609; 3 A. 647; 20 B. 290; 9 A. 690. The extent of

encumbrance should be given in the proclamation. 7 O. 34. The object of stating the encumbrance is to give to the intending purchasers the information which is necessary for them to know in respect of the property advertised for sale. 28 A. 418; 81 I.C. 1013; 64 I.C. 953=4 U.B.R. (1921) 62.

Cl. (d).—The proclamation of sale ought to contain the amount for the recovery of which the sale is ordered. 36 P.W.R. 1919.

Cl. (e).—Profits of the land to be sold should be stated in the sale proclamation. The property to be sold should be specified as fairly and accurately as possible and every other thing besides those mentioned in the rule which the Court considers material for the purchaser to know in order to judge of the nature and value of the property shall be specified. 4 O.C. 329; 8 C.W.N. 257; 8 C.W.N. 264; 3 Mys. L.J. 153. The approximate value of the land should be stated in the sale proclamation. 1922 O. 93. The value fixed by the Court for the sale proclamation need not be the free value of the property. It is a mere estimate which should as far as possible be a fair estimate. 1 Pat. 214=(1922) Pat. 550. The value of the property should be stated in the proclamation. 24 I.C. 468=7 Bur. L.T. 64. For the effect of non-compliance with the provisions of the clause see *infra*, "Irregularities".

NOTICE.—The provisions for notice under O. 21, r. 66 are directory and not mandatory; they have not been elected for the judgment-debtor, but with a view to ascertain the exact rights which should be set forth in the proclamation of sale. 44 I.O. 252; 1 Mys. L. J. 105. The object of the proclamation is to give notice to the intending purchasers and to the judgment-debtor. 12 W.R. 488. Object of the notice to the judgment-debtor is to enable the Court to put his case before it. 14 C.L.J. 541. A Court has no jurisdiction to fix the valuation on a sale proclamation before the day fixed for hearing the parties as to the proper valuation. 3 Pat. L.T. 342=65 I.C. 360. It had been held in Burma that an omission to give notice to the judgment-debtor of an execution sale is more than an irregularity and renders the sale void. 38 I.C. 98=11 Bur. L.T. 40; (*contra* held in 11 L.W. 59; 14 C.L.J. 541=13 I.C. 337; 74 I.C. 838=1923 P. 283; that the notice required under this rule is a mere incident in the course of execution proceedings.) It is a material irregularity according to the Lahore High Court. 4 L. 243. Where a notice under this rule cannot be personally served on the judgment-debtor, the affixing of it on the door of his house with a receipt of the judgment-debtor of a registered notice by post is sufficient service of the notice. 78 I.C. 727. A Court is not precluded from issuing a sale proclamation before objections filed by the judgment-debtor are judicially disposed of; but the property should not be sold before the disposal of such objections. 43 I.C. 450. The notice required by r. 66 (2) is not necessary in the case of a fresh proclamation under r. 69 which is published in the manner prescribed by O. 21, r. 54 (2). 90 I.C. 351.

SERVICE OF PROCLAMATION.—In the case of a proclamation the Court should not place implicit reliance on the Nazir's return or the chowkidar's receipt, but the fact of the proclamation having been made should, when disputed, be proved on oath or affirmation like any other fact. 3 W.R. Mis. 11; 10 W.R. 3; 9 W.R. 530; 11 B.H. C. 46; 7 C. 34. The fact of publication of sale proclamation is a matter which must be usually proved by the officer of the Court who is charged with publishing it, and it is only under special circumstances that the officer should be called upon to support his return by the testimony of other persons. 24 W.R. 227.

REVISION.—An order of the Court under O. 21, r. 66 can be interfered in revision by the High Court under S. 107 of the Government of India Act, if not under S. 115 of the C.P. Code. 2 Pat. L.J. 130=37 I.C. 872 F.B.; 18 M.L.J. 568.

RES JUDICATA.—Proceedings under this rule are not *res judicata* when raised in a regular suit later on. 78 I.C. 582.

ADDITIONAL RULE MADE BY THE RANGOON HIGH COURT.—O. 21, r. 66 (2) proviso.—Provided that no such notice shall be necessary in the case of moveable property not exceeding Rs. 250 in value.

MODE OF MAKING PROCLAMATION.—(1) Every proclamation shall be made and published, as nearly as may be, in the manner prescribed by rule 54, sub-rule (2).

(2) Where the Court so directs, such proclamation shall also be published in the Local Official Gazette, or in a local newspaper or in both, and the costs of such publication shall be deemed to be costs of the sale.

(3) Where property is divided into lots for the purpose of being sold separately, it shall not be necessary to make a separate proclamation for each lot, unless proper notice of the sale cannot, in the opinion of the court, otherwise be given. (O. 21, r. 67.)

Where a proclamation of sale of land was not published in the village where the lands were situate but the process-server intimated at the village that the sale would be held at a place and by an officer different from those fixed by the proclamation a sale held at place and by the official fixed by the proclamation is illegal and not merely irregular under O. 21, r. 90; 44 M. 35. The Court may in its discretion direct an advertisement of the sale in the Gazette but there is no obligation on the part of the court as under the old Code. 53 I.C. 794=1 L. L.J. 197.

TIME OF SALE.—Save in the case of the property of the kind described in the proviso to rule 43, no sale hereunder shall, without the consent in writing of the judgment-debtor, take place until after the expiration of at least thirty days in the case of immovable property and of at least fifteen days in the case of moveable property, calculated from the day on which the copy of the proclamation has been affixed on the Court-house of the judge ordering the sale. (O. 21, r. 68.)

No sale should take place before the time fixed. 16 O. 794. On an adjournment of a court sale after several previous postponements by the court itself on its own motion, the rule that thirty days shall elapse between the proclamation and the sale, must in the absence of waiver by the debtor be strictly complied with, though such last adjournment might be to the debtor's benefit. 5 O. 259.

ADJOURNMENT OR STOPPAGE OF SALE.—(1) The Court may in its discretion adjourn any sale hereunder to a specified date and hour, and the officer conducting any such sale may in its discretion adjourn the sale, recording his reasons for such adjournment:

Provided that where the sale is made in or within the precincts of the court-house, no such adjournment shall be made without the leave of the Court.

(2) Where a sale is adjourned under sub-rule (1) for a longer period than seven days, a fresh proclamation under rule 67 shall be made unless the judgment-debtor consents to waive it.

(3) Every sale shall be stopped, if, before the lot is knocked down, the debt and costs (including the costs of the sale) are tendered to the officer conducting the sale, or proof is given to his satisfaction that the deposit of the amount of such debt and costs has been made into the Court which ordered the sale. (O. 21, r. 69.)

SCOPE.—When an execution sale is postponed on the ground that the decree has been satisfied, O. 21, r. 69 has no application to such a case. 75 I.O. 676=4 Pat. L. T. 495. When it is beneficial to the judgment-debtor or where the immediate sale is likely to be attended with ruinous or unduly injurious consequences to him, and there is no serious injury to the decree-holder, an adjournment may be allowed. 20 W.R. 130; 10 M.I.A. 322. A court may adjourn the sale, after it is partially held, on its own motion. 26 I.O. 273=(1914) M.W.N. 873. A court may adjourn a sale for proper reasons, in order to have a better sale. 31 C. 373; 22 W.R. 481; 21 L.W. 521=88 I.O. 228; or with the consent of the parties, 22 W.R. 481; (6 M.H.C.R. 410 it cannot be postponed at the desire of the decree-holder that he has made a private purchase).

FRESH PROCLAMATION.

SUB-RULE (2).—When a sale is fixed to take place on one day, it cannot properly be held on another day without the issue of a fresh proclamation unless the judgment-debtor consents to such proclamation. A.W.N. (1887) 50. There may be a waiver of a fresh proclamation of sale on the part of the judgment-debtor. 16 C.W.N. 704=11 I. C. 438. The guardian *ad litem* of a minor judgment-debtor is a fit person to give his consent for the minor under O. 21, r. 69, waiving his right to a fresh proclamation. 6 I.O. 813=14 C.W.N. 1019. When a certain date, 13th July 1903 is fixed for the proclamation of sale and it is further notified that in the absence of any order of postponement the sale could be held at the monthly sale commencing on 13-7-1903 but owing to the absence of the subordinate judge from the station the monthly sales did not begin till the 17th and the sale of the property actually took place on the 20th, held that in the circumstances of the case no fresh proclamation was necessary. 39 O. 26 P.C. In all cases in which an

execution sale may be postponed to another day it is necessary that the formalities required by law should be gone through afresh unless the parties waive the right. 3 C. 542; 20 I.C. 192=6 Bur. L.T. 65. Where a Court stays a sale pending further orders a fresh proclamation is necessary. 75 I.C. 343=1923 R. 154. If an execution sale is postponed it is necessary that a fresh proclamation must issue. 45 P.R. 1886. An application by the judgment-debtor on the day of sale that a portion only of the advertised property may be sold would not amount to a consent under the rule so as to dispense with the necessity for fresh proclamation thereof. 5 C. 259. Where a fresh proclamation is not issued as required by O. 21, r. 69, the judgment-debtor's remedy is to object to the confirmation of the sale and not impeach the sale by a regular suit. 9 Bom. L.R. 83. Where there is a series of adjournments each less than seven days but which taken together exceeds seven days, a fresh proclamation is necessary. 6 C.W.N. 44. When according to the High Court rules which have the force of law, the practice of the Courts is to place on a list all the properties intended for sale in execution of a decree and the sale comes on a day fixed which must go on from day to day till the list is cleared and each property is taken in its turn, an adjournment of the sale of a particular property owing to such procedure is no adjournment within the meaning of O. 21, r. 69. 17 C. 152.

WHO MAY ADJOURN.—A sale held in the Court's precincts cannot be adjourned by the officer conducting the sale without the leave of the Court. 12 M.L.J. 97. A District Judge has no jurisdiction to order a Subordinate Judge in a case pending before the latter to postpone the sale. 5 N.W.P. 177; 4 I.C. 373=10 C.L.J. 456.

ADJOURNMENT TO A SPECIFIED DAY AND HOUR.—The exact provisions of the Code should be followed and the adjournment of sales should be to a specified day and hour. 20 M. 159; 6 C.W.N. 48; 31 C. 815; 34 C. 709 P.O.; 84 I.C. 700; 13 I.C. 337=14 C.L.J. 541; 24 C. 291; 8 C.W.N. 686.

ADJOURNMENT OF SALE IN COURT PRECINCTS.—When a sale conducted in the precincts of the court is adjourned to another date, an order of the court to that effect is necessary. 12 M.L.T. 97.

"THE DEBT AND COSTS."—When the properties of the judgment-debtor were to be sold in three lots and after the sale of two lots he tendered to the bidding officer the balance of the decretal amount which would have remained if the purchasers of the first two lots paid up the amount held that this did not amount to payment of the debt and costs." The expression "debt and costs" in cl. 3, of r. 69 could not be interpreted to mean the balance of the decree debt and costs which could remain if by a legal fiction the sale of previous lots (not yet contemplated by the payment of the whole purchase money) were taken as contemplated by treating the whole of the purchase money as actually paid up. (1914 M.W.N. 873=26 I.C. 273. The rule applies to mortgage decrees. 25 M. 244 F.B.; 19 A. 205; 20 A. 354; 31 M. 354; 31 C. 863; 28 A. 28; *Contra* was held in 31 C. 373; 25 C. 703.)

SUB. Rule (3).—O. 21, r. 69 must be taken to have modified S. 89 of the T.P. Act. When the debts and costs (including costs of the sale) are tendered to the officer conducting the sale or when it is proved to his satisfaction that the amount of the such debts and costs had been paid into the court that ordered the sale. 20 A. 354; 19 A. 205; 82 A. 28.

SAVING OF CERTAIN SALES.—Nothing in rules 66 to 69 shall be deemed to apply to any case in which the execution of a decree has been transferred to the Collector. (O. 21, r. 70.)

DECREE-HOLDER NOT TO BID FOR OR BUY PROPERTY WITHOUT PERMISSION.—(1) No holder of a decree, in execution of which property is sold, shall, without the express permission of the Court, bid for or purchase the property.

(2) Where a decree-holder purchases with such permission, the purchase money and the amount due on the decree, may, subject to the provisions of section 73, be set off against one another, and the Court executing the decree shall enter up satisfaction of the decree in whole or in part accordingly.

(3) Where a decree-holder purchases himself for through another person, without such permission the Court may, if it thinks fit, on the application of the judgment-debtor, or any other person whose interests are affected by the sale, by order set aside the sale, and costs of such application and order and any deficiency of price which may happen on the resale, and all expenses attending it shall be paid by the decree-holder. (O. 21, r. 72.)

APPLICABILITY.—Permission for leave to bid is required even in sale conducted by the Collector. A.W.N. (1887) 214. When a decree-holder has purchased the property in execution of a decree under the Bombay Land Revenue Code, Act V of 1879, the case falls under S. 47, O.P. Code, and no separate suit could be maintained and the sale could be set aside under the provisions of the O. P. Code. 22 C. 271; 23 A. 478.

DECREE-HOLDER.—The rule has no application to holders of decrees other than those in execution of which the property is sold. 2 Bur. L.J. 166=79 I.C. 747. An assignee of a decree by an oral assignment, is not one that can apply for execution and hence he may not obtain leave to bid. 4 C.W.N. 474; 16 I.A. 107.

PERMISSION TO BID.—The law authorises a court to impose any condition it considers fit on the permission granted to a decree-holder to bid at the sale of the property of his judgment-debtor. An order imposing on the decree-holder a condition that his lowest bid should be the amount of the decree is not *ultra vires* or illegal but valid and enforceable. 15 I.C. 888=16 O.C. 86. The leave should be given cautiously and only when it is found that no purchaser at an adequate price can be found. 16 C. 132. It is a rare privilege to be cautiously exercised. 7 C. 346; 5 C. 306; (but see 23 M. 227 P.C. it is a common thing). When a mortgagee has purchased the equity of redemption in contravention of the provisions of S. 99 of the T.P. Act it should not be presumed under S. 114 of the Evidence Act in the absence of evidence, that the court granted leave to bid. 47 O. 377 F.B. Unless any condition is imposed, the decree-holder is in a position in no way different from that of any other bidder. 23 M. 227 P.C. When the bid at an auction did not go beyond Rupees 5,000, while the valuation of the property by a "panch" was Rs. 40,000, the decree-holder should be permitted to bid and the court should make an attempt for the sale of the property even though the decree-holder offered in his

application an amount of Rs. 20,000. 26 Bom. L.R. 770=83 I.C. 379. Rule 153 of the Madras Rules of Practice lays down that in applying for leave to bid, an affidavit shall be filed setting forth facts showing that an advantageous sale cannot be otherwise had. The court may impose a condition that a certain sum of money due to a prior charge holder should be paid to him. 69 I.C. 872=1922 P. 511. There is no provision of law compelling a decree-holder to bid up to any sum which may be fixed by the court; and the mere fact that the decree-holder did not observe the condition on which he was allowed to bid at the sale could not do more than take away the validity of the decree-holder's own bid: it cannot affect the validity of the bids of a third person who is an independent bidder at the sale. 1926 P. 335; 1926 P. 140.

PURCHASE BY ONE OF SEVERAL DECREE-HOLDERS.—Where one of several joint decree-holders made an application for the execution on his own behalf and on behalf of his co-decree-holders, and then alone obtained leave to bid for the property and purchased it, the purchase money being equal to the amount of his share of his decree, *held* in a suit by the co-decree-holders to receive their share of the property purchased that they could receive it, the equity being on the side of the plaintiffs. 39 A. 553.

BENAMI PURCHASE.—A purchase made in the name of a third person for the decree-holder is governed by this rule. 10 C. 757. A purchase by the son of the decree-holder may be considered as *benami* for the father. 5 B. 130.

RIGHT OF SET OFF.—If the decree-holder gets permission to bid without qualification, then the amount due on the mortgage may, if he so desires, be set off. But it may be one of the conditions on which permission to bid is granted that there should not be this right of set off. In such a case no set off can be allowed. 32 B. 379. The power given by the Court under O. 21, r. 72 to sanction in a proper case, in order to prevent trouble and inconvenience a set off, instead of payment is not intended to alter the nature of the transaction and would not justify a purchaser that has obtained this indulgence to take advantage of it, so as to alter the substance of the transaction and alter the rights of other creditors by rendering the purchase money less applicable to the satisfaction of their debts under S. 73, C.P. Code. 12 C. 499; 11 M. 356; 16 B. 91; U.B.R. 1924, 4th Qr. Sch. II, 13; 5 M. 123; 2 M.L.J. 288; 6 B. 570; 5 M.L.T. 125. When the decree-holder is the purchaser there is no reason why he should not instead of paying the purchase money in cash, give receipts for the amount due to him under his decree. 16 W.R. 46. The decree-holder purchaser may apply to the Court to set off the purchase money against the decretal amount. 44 B. 346. The right of set off is subject to the right of a rival decree-holder to rateable distribution under S. 73, C.P. Code. 12 L.W. 328; 43 I.C. 715; see also cases under S. 73, C.P. Code. 11 M. 356; 5 M. 123; 6 B. 570; 12 C. 499; 16 B. 91; see also 80 I.C. 40=1925 O. 287.

TIME FOR SET OFF.—The application under O. 21, r. 72 for being allowed a set off need not be made within 15 days, in the case of sale of moveable property as provided by O. 21, r. 85 from the date of the sale. It may be made afterwards. So in the case of a decree-holder purchaser, a deposit cannot be forfeited under O. 21, r. 85 even if the deposit is not made within the time allowed, but an application for set off is made even after such time. 3 O.C. 240.

Leave to bid at a sale held in execution of a mortgage decree puts an end to the disability of the mortgagor and places him in the same position as any other purchaser. 4 C.W.N. 474; 10 I.A. 107; 26 B. 88; 19 C. 4. If the conditions imposed on the decree-holder are not fulfilled, it can refuse to confirm the sale. 69 I.C. 872=1922 P. 511. Leave to bid puts the decree-holder in the same position as any other purchaser.

and the standard of the fairness in the purchase does not differ from that applicable to the latter. 16 O. 682 ; 23 M. 227 P.O. ; 7 O. 346. Once a Court has given permission to the decree-holder to bid, it has no right to review its order to the decree-holder's prejudice without any intimation to the decree-holder and without giving him an opportunity of being heard. An order passed under such circumstances is materially irregular. 12 O.L.J. 351.

PURCHASE BY DECREE-HOLDER WITHOUT PERMISSION.—Disregard of statutory provisions that leave to bid should be obtained by a judgment-creditor is merely an irregularity of practice and is not a fundamental breach of trust which nullifies the apparent effect of a Court sale. It only makes the sale voidable under O. 21, r. 72 if the application to set aside the sale were made within the period of limitation under Art. 12 of the Limitation Act. 41 B. 357 ; A.W.N. (1882) 26 ; 14 M. 498 ; 75 I.O. 196 = 27 C.W.N. 208 ; 5 B. 575 ; 10 O. 757 ; 1 I.C. 645 ; 11 B. 588 ; 21 O. 554 ; 22 B. 624 ; 32 M. 242 ; 5 M.L.T. 248 ; 67 I.O. 914 = 31 M.L.T. 209 P.O. ; 75 I.O. 196 = 27 C.W.N. 208 ; 44 B. 352 (*Contra* held in 5 C. 308 ; 10 O. 757 ; where the sale is held to be invalid whether the objection is taken and pressed or not). The mere fact that the decree-holder has associated with himself a stranger would not make a sale valid when the bid is a joint one, and the interest of the decree-holder cannot be separated. 16 O.C. 86 = 15 I.C. 888. The fact that the decree-holder had applied for permission, and had been refused, makes no difference. 67 I.C. 914 P.C. The fact that the sale has been confirmed does not affect the case. 32 M. 242. If no objection to the sale is taken, it is as valid as if leave to bid was obtained. 22 B. 624. But if the sale is challenged for want of leave to bid, no presumption should be made that leave has been obtained. 47 C. 377. A purchase without permission would be valid as against a trespasser and the purchaser is entitled to maintain a suit against him. A.W.N. (1882) 26. The purchase of a property at an execution sale by the decree-holder, in the name of another person, at a price less than that at which the decree-holder obtained permission to bid for the said property constitutes fraud which would vitiate the sale. 5 C.W.N. 265. A purchase under O. 21, r. 72 without permission is liable to be set aside. But it could not be avoided against a trespasser in good faith for valuable consideration. 13 M.L.J. 230 ; 30 M. 295. The criterion for setting aside a sale under O. 21, r. 72 is whether the property had been really sold to the best advantage or not ; if not, the Court would set aside the sale ; otherwise it does not matter that the decree-holder bought without permission or that he had applied for permission and had been refused. 67 I.O. 914 P.O. ; 11 O. 731 ; 32 M. 242. The sale should not be set aside unless substantial injury has been caused. 11 O. 731 ; 5 C. 308 ; 4 C.W.N. 474 (*contra* in (1921) M.W.N. 535 = 62 I.C. 854, where it is held that it is not necessary that there should be a finding that substantial injury has resulted, but see 45 M.L.J. 718 P.O.) When a decree-holder purchases property in contravention of this rule and sues the judgment-debtor and his transferees for possession, it is open to the defendants to have the sale set aside in the suit by way of answer to the plaintiff's claim. 32 M. 242.

WHO CAN RAISE OBJECTION TO PURCHASE BY THE DECREE-HOLDER.—

An objection to the purchase of properties at a Court sale without the leave of the Court can only be raised by parties to the suit and not by strangers. 17 I.O. 126.

PERMISSION OF THE COURT.—When proceedings in execution of a decree have been sent to a Collector, the decree-holder can apply to the Collector to grant him leave to bid at the sale under r. 91 sub-cl. 16 of the Bombay High Court Circular, 1912. If the decree-holder desires a set off he should apply to the Court under O. 21, r. 72. 44 B. 346 ; 42 B. 621.

ADDITIONAL RULE MADE BY THE ALLAHABAD HIGH COURT.—O. 21, r. 113.—When permission has been given to a decree-holder to bid for property, the Court ordering the sale shall inform the officer appointed to conduct the sale, whether, there are any persons in addition to the decree-holder, entitled to share in the sale proceeds.

SUIT.—When the decree-holder purchases the property without permission of the Court the remedy of the judgment-debtor is to proceed by an application under O. 21, r. 72 and no separate suit lies. 22 B. 371 ; 17 C. 769 ; 9 B. 468 ; 16 M. 287 ; 12 M. 454 ; 23 A. 478 (purchase by a benamidar for the decree-holder). But a suit by the benamidar purchaser of the decree-holder, for possession of the property against the judgment-debtor is not barred under S. 47. The benamidar is a third party for the purposes of S. 47. 44 B. 352.

APPEAL.—No appeal lies from an order refusing or granting leave to a decree-holder to bid at an execution sale. 38 C. 717 P.O.; A.W.N. (1883) 104 ; 13 C. 174. An appeal lies from an order setting aside or refusing to set aside a sale under r. 72. See O. 43, r. (1) (j) ; 24 A. 108 ; 13 C. 174 = 10 C. 368. There is no second appeal in such cases. 21 C. 789 ; 28 I.O. 270 = 13 A.L.J. 351 ; as the first appeal is from the order under O. 43, r. (1) (j) and S. 47 does not enlarge the right of appeal, limited strictly by O. 43, r. 1 (j.)

RESTRICTION ON BIDDING OR PURCHASE BY OFFICER.—No officer or other person having any duty to perform in connection with any sale shall either directly or indirectly bid for, acquire or attempt to acquire any interest in the property sold. (O. 21, r. 73.)

SCOPE.—O. 21, r. 73 does not prohibit Vakils of parties to a suit from purchasing property sold in execution of the decree. 10 M. 111. But a pleader of the decree-holder purchasing the property sold in execution of his client's decree is guilty of professional misconduct. 17 I.O. 599 ; see also 2 N.W.P. 46 ; 13 W.R. 209 ; 17 W.R. 480. The court will look with suspicion on the purchase by the pleader and throw the onus on the client to prove that the transaction was free from suspicion. 15 M. 389 ; 23 C. 805 ; 17 C.W.N. 679.

ADDITIONAL RULE MADE BY THE HIGH COURT OF BOMBAY.—O. 21, r. 73-A.—If leave to bid is granted to the mortgagee of immoveable property a reserve price as regards him shall be fixed of not less than the amount then due for principal, interest and costs in case the property is sold in one lot, and not less, in respect of each lot, (in case the property is sold in lots) than such sum as shall appear to be properly attributable to it in relation to the amount aforesaid.

PAYMENT OF PRICE.—Where moveable property is sold by public auction, the price of each lot shall be paid at the time of sale or as soon after as the officer or other person holding the sale directs, and in default of payment the property shall forthwith be resold. (O. 21, r. 77.)

On every sale of immoveable property the person declared to be the purchaser shall pay immediately after such declaration, a deposit of twenty-five per cent. on the amount of his purchase-money to the officer or other person conducting the sale and in default of deposit the property shall forthwith be re-sold.

Where the decree-holder is the purchaser and is entitled to a set off of the purchase-money under rule 72, the Court may dispense with the requirements of this rule. (O. 21, r. 84.)

The full amount of purchase-money payable shall be paid by the purchaser of immoveable property into Court before the Court closes on the fifteenth day from the sale of the property :

Provided that, in calculating the amount to be so paid into Court, the purchaser shall have the advantage of any set off to which he may be entitled under rule 72. (O. 21, r. 85.)

WITHIN FIFTEEN DAYS.—The time during which a Court is closed for the vacation is not a holiday within the meaning of r. 85. Days on which the office is open or the purchase-money could have been paid are office days. 20 B. 745. In computing 15 days allowed for the payment of the balance of the purchase-money under O. 21, r. 85, the day of sale is excluded. 3 Agra. 204. The provisions of rr. 85 and 86 are mandatory. 51 I.C. 316. On default of the purchaser at a Court sale to deposit the purchase-money within 15 days of the sale, the deposit must be forfeited to the Government, notwithstanding that the decree-holder and the judgment-debtor do not ask for a resale, but consent to the original sale being allowed to stand. 25 M. 535 ; 2 Bom. L.R. 901.

WITHDRAWAL AND RE-DEPOSIT.—A stranger auction-purchaser who had deposited the purchase-money under O. 21, r. 85 in time, withdrew the same on the sale being set aside by the first Court at the instance of the judgment-debtor. The sale was however confirmed on appeal by the decree-holder. Four months after, the auction-purchaser applied for confirmation of his sale and repaid the money into Court ; held, that the sale did not come to an end by the purchaser withdrawing the money from the Court and that after the confirmation of sale by the Appellate Court, the purchaser was bound to repay the purchase-money which he had withdrawn, that the time limit fixed by O. 21, r. 85, did not apply to the repayment of money by the auction-purchaser. (1917) M.W.N. 861 = 42 I.C. 552.

EXTENSION OF TIME.—Though it is not open to the Court to extend the time for payment of the purchase-money without the consent of the parties, still when an extension of time has been granted without objection on the part of the parties and the sale has been confirmed, and the money drawn by the decree-holder, the sale cannot be set aside on the ground of irregularity. 69 I.C. 1001 = 1923 M. 48.

PAYMENT INTO COURT.—Under the rules of the High Court of 21st June, 1882, the Treasury becomes for the purposes of payment, part of the establishment of the Court. Therefore, when the balance of the purchase-money was brought to the Court on the 14th day after sale and a challan was obtained and both were taken to the Treasury, but the Treasury officer had closed the treasury for the day and the next two days being holidays for the Treasury, the money had to be paid on the 17th day, the Court ought to consider such payment as made in time. 7 M. 211.

DEPOSIT OF 25 PER CENT.—The deposit of 25 per cent. must be made even by the decree-holder purchaser. But when all parties waive their right to have that amount deposited in cash, the sale ought not to be set aside, on the ground that a cash deposit has not been made. 5 O.L.R. 181. When the decree-holder is the purchaser there is no reason why he should not instead of paying the purchase money in cash give receipts for the amount due to him under his decree. 16 W.R. 46. In case of a default on the part of the purchaser at an auction-sale to deposit the purchase-money the property must be re-sold forthwith. Fresh bids should be invited forthwith soon afterwards and no fresh proclamation of sale is necessary. 16 O. 93 ; 12 M. 454 ; 45 P.W.R. 1916 = 32 I.C. 970.

V.—RE-SALE.

IN WHAT CASES RE-SALE IS TO BE MADE.—In default of payment of the price of each lot of moveable property at the time of the sale or soon after as the officer or other person holding the sale directs, the property shall forthwith be re-sold. (O. 21, r. 77.)

In default of payment of a deposit of twenty-five per cent. by the purchaser, on the amount of his purchase money, to the officer or other person conducting the sale, immediately after the declaration of such person to the purchaser the property shall forthwith be re-sold. (O. 21, r. 84.)

The property shall forthwith be re-sold, no fresh proclamation is necessary. 45 P.W.R. 1916 = 32 I.C. 907.

In default of payment of full amount of purchase-money payable within the period of fifteen days from the sale of the property by the purchaser into Court, the property shall be re-sold and the defaulting purchaser shall forfeit all claims to the property or to any part of the same for which it may subsequently be sold, and the deposit of twenty-five per cent. may if the Court thinks fit after

defraying the expenses of the sale be forfeited to the Government. (O. 21, r. 86.)

Where a sale is set aside on the ground of being made in favour of the decree-holder without the permission required by Order 21, rule 72, the property may be re-sold. (O. 21, r. 73 (3).)

After a sale is set aside under rules 89, 90 and 91, the property attached may be re-sold.

NOTIFICATION ON RE-SALE.—Every re-sale of immoveable property in default of payment of the purchase money within the period allowed for such payment, shall be made after the issue of a fresh proclamation in the manner and for the period hereinbefore prescribed for the sale. (O. 21, r. 87.)

LIMITATION FOR APPLICATION FOR RE-SALE.—Art. 178 governs as application by a decree-holder for a fresh sale and time does not run until he is compelled to refund the purchase-money to the purchaser. 30 M. 209.

EFFECT OF RE-SALE.

DEFAULTING PURCHASER ANSWERABLE FOR LOSS ON RE-SALE.—Any deficiency of price which may happen on a re-sale by reason of the purchaser's default and all expenses attending such re-sale shall be certified to the Court or to the Collector or subordinate of the Collector as the case may be, by the officer or other person holding the sale and shall at the instance of either the decree-holder or the judgment-debtor, be recoverable from the defaulting purchaser under the provisions relating to the execution of a decree for the payment of money. (O. 21, r. 71.)

SCOPE.—The provisions of O. 21, r. 71, apply to all sales whether of moveable or immoveable property and also to re-sales held under O. 21, rr. 77, 84, 85 and 86. 7 C. 337; 12 M. 454; 2 O.W.N. 411; 3 L.B.R. 225; 16 C. 535; 5 B. 575; 44 A. 266; 50 I. C. 59. Default in payment of the poundage fee as laid down in rr. 5 and 6 of the High Court Rules and Circular Orders, as a result of which a re-sale takes place makes the defaulting purchaser liable for deficiency of price under O. 21, r. 71. 9 C.L.J. 115 = 3 I.C. 286. When a sale is set aside under O. 21, r. 72, on the ground that it was made without the permission of the Court, the decree-holder is liable to make up any deficiency of price fetched at a re-sale. 13 M.L.J. 231. Failure of the defaulting purchaser to make a deposit under O. 21, r. 84, makes him liable for deficiency of price fetched at a re-sale. 5 B. 575; 12 M. 454; 3 L.B.R. 225; 7 C.

337 ; 44 A. 266 ; 50 I.C. 59. Whether there is a default in the payment of the initial deposit of 25 per cent. of the purchase-money or in the deposit of the balance under O. 21, r. 85, the property must be re-sold and the difference of price recovered from the defaulting purchaser. 44 A. 266 F.B. ; 50 I.C. 59=1919 P. 210. The contrary rulings 30 A. 273 and 16 O. 33 are no longer good law. When a purchaser made a default in payment of the purchase-money and a re-sale was ordered, but before it took place the property was sold in execution of another decree at a lower price, the auction-purchaser is not liable to make up the deficiency as it is not a re-sale, 16 W.R. 14 ; 16 O. 535. The provision in r. 71 for payment of deficiency, is a salutary one and intended to minimise the hardship caused by the purchaser's default and the Court should give effect to it unless the defaulting purchaser would be substantially prejudiced. 21 L.W. 232 ; 87 I.C. 1=1925 M. 631.

APPLICABILITY.—The provisions of O. 21, r. 71, are applicable where default has been made by a purchaser in payment of the deposit required to be made by him in respect of property purchased by him at an auction-sale when that sale is held in execution of a Civil Court's decree or by the Collector, in pursuance of the Public Demands Recovery Act. (1919) Pat. 210=50 I.C. 59. When the highest bidder at the auction of an insolvent's property sold by the receiver appointed under the Provincial Insolvency Act fails to deposit the one-fourth of the purchase-money and the property is thereafter re-sold at a loss, the Receiver cannot realise the loss from the bidder under O. 21, r. 71, C.P. Code. 39 A. 267 ; 62 I.C. 307.

EXTENT OF LIABILITY.—No interest allowed. Only the difference in purchase-money is allowed and not any interest on the difference in price. 9 W.R. 500. The defaulting auction-purchaser is not liable for interest on the deficit amount from the date of the sale to the date of the order of the Court directing him to repay. 78 I.C. 296=46 M.L.J. 134.

The purchaser is liable for the deficiency of price and the expenses of the re-sale and nothing more. 3 W.R. 3. On a re-sale of immoveable property the defaulting purchaser shall forfeit all claim to the property and to any part of the sum for which it may subsequently be sold ; and the deposit of 25 per cent. may if the Court thinks fit, after defraying the expenses of the sale be forfeited to the Government (O. 21, r. 86). When the purchaser failed to pay the balance, but the sale was set aside under O. 21, r. 89, by the judgment-debtor, it was a proper case for refunding the deposit. 32 A. 380. The old Code gave no discretion to the Court in this matter. Where a decree-holder purchases himself or through another person without the permission of the Court under O. 21, r. 72, the Court may if it thinks fit, on the application of the judgment-debtor or any other person whose interests are affected by the sale by order set aside the sale, and the costs of such application and order and any deficiency of price which may happen on the re-sale and all expenses attending it shall be paid by the decree-holder. (O. 21, r. 73 (3)).

REMEDIES OF AGGRIEVED PARTY ON RE-SALE.—The parties affected by re-sale are the decree-holder, the judgment-debtor and the defaulting auction-purchaser. The judgment-debtor or the decree-holder can proceed under O. 21, r. 71, against the defaulting purchaser as if there was a decree passed against him for the payment of money amounting to the deficiency of price at re-sale. This rule does not declare that the remedy conferred by its provisions is the only remedy by which a person damaged in the manner indicated by the rule can recover damages. But if a person elects to proceed under r. 71, he deprives himself of the right to proceed subsequently under common law for an alternative remedy unless the certificate granted to him is rendered useless by error in procedure or by the defaulting purchaser's conduct. 50 I.C. 59= (1919) Pat. 210 ; 12 I.C. 360. A person ordered in the capacity of a defaulting purchaser to make good the deficiency of price which has resulted on a re-sale of property

may bring a separate suit to set aside the order and to recover the money realised from him. 7 N.L.R. 134; 19 A. 22. As to right of appeal see *infra*. The judgment-debtor or the decree-holder has a right to proceed against the defaulting auction-purchaser by a separate suit for the recovery of loss on re-sale. 12 A. 22; 36 B. 329; 16 C. 536. According to the Patna High Court if a person properly brings proceedings under r. 71 and executes a certificate under that rule as a decree, then having exercised his election he deprives himself of the right of subsequently asserting whatever alternative remedy he may or might have at common law. If however the remedy and the procedure provided by r. 71 become inoperative and nugatory in effect and infructuous in result, owing to an error in procedure then the judgment-debtor is entitled to pursue the alternative remedy which he has otherwise got under the common law to recover damages for the wrong that has been done to him at the hands of the defendant; and more especially is this so when the certificate granted under r. 71 has become infructuous merely by reason of the defendant's conduct. (1919) Pat. 210 = 50 I.C. 59. It is not necessary that a decree-holder should recover the deficiency of price at a re-sale before attaching other properties of the judgment-debtor. He may proceed against other properties. 8 C. 291; 2 B. 562; 24 M. 307; 21 W.R. 149. When a judgment-debtor's property is sold in execution of a decree for a sum more than sufficient to satisfy the decree and default is made by the auction-purchaser in the payment of the purchase-money, the Court will not be justified in ordering the sale of a further portion. The proper procedure is to re-sell the same property and then if sum realised by the re-sale is insufficient to satisfy the decree it is open either to the judgment-debtor or decree-holder to apply that the balance should be recovered from the defaulting auction-purchaser. 8 C.L.R. 41.

APPEAL—An order of the Court directing the defaulter to pay or absolving him from the liability to pay the difference between the prices at the two sales is appealable. 25 C. 99; 16 C. 535; 1 A. 181; 7 W.R. 110; 6 W.R. Mis. 126; 9 W.R. 500; 16 W.R. 14; 3 W.R. 3; 18 M. 439; 12 M. 454. According to the Allahabad High Court no appeal lies from such an order. 14 A. 201; 12 A. 397; 19 A. 22.

APPEAL FROM THE ORDER OF FORFEITURE.—There is no appeal from the order of forfeiture of the deposit of 25 per cent. when there is a default on depositing the full amount of the purchase-money within 15 days after the sale. 120 P.R. 1891.

CONDITIONS OF LIABILITY ON RE-SALE.—When the preliminary deposit is not paid immediately and the property is subsequently but not "forthwith" put in again to auction to be sold for a considerably less sum *held* that the first sale was not merely irregular but no sale at all and that the first purchaser was not liable to pay compensation for the re-sale. 30 A. 273; but see now, 44 A. 266 F.B.; 50 I.C. 59 = (1919) Pat. 210. In case of a default on the part of the auction-purchaser to deposit the purchase-money, the property must be re-sold forthwith. Fresh bids should be invited soon afterwards and no fresh proclamation of sale is necessary. When therefore a period of nearly six months intervened between the default of the auction-purchaser and the final sale *held* that the requirements of O. 21, r. 84, had not been complied with and the auction-purchaser could not be called upon to pay the deficiency in price. 45 P.W.R. 1916 = 32 I.C. 970. The reasonable construction to be placed on r. 71 is that re-sale should be within a reasonable time after the first sale and the property re-sold should be substantially the same and that any difference will not matter, if the difference in the condition of the property or the title thereto is one which would occur in the ordinary course of things having regard either to the nature of the property or transactions in respect thereof having legal force at the date of sale or was brought about by the first purchaser's default. 41 M. 474. (*Per* Kumaraswami Sastri, J.) The

re-sale must be held "forthwith" under O. 21, r. 84, otherwise the defaulting purchaser is not liable. 88 I.C. 131=28 O.C. 327. The liability of the auction-purchaser in the first sale under O. 21, r. 71, is the creation of a statute relating to procedure and the auction-purchaser who is sued for the deficiency in the second sale is entitled to appeal to the words of O. 21, r. 66, to show that the statute had not been complied with and it cannot be said that there was not a re-sale of the property which was put up in the first instance. 36 B. 329. O. 21, r. 71, has reference to the defaulting purchaser and is concerned only with the legal relation created by a purchase assumed to be regularly made with the consequences of its repudiation by the bidder. 42 M. 776. There must be a re-sale of the same property that was first sold and under the same description and any substantial difference of description at the sale and re-sale in any of the matters required to be specified in O. 21, r. 66 to enable the intending purchasers to judge of the value of the property should disentitle the decree-holder to recover the deficiency of price under O. 21, r. 71. 16 C. 535; 14 I.C. 777. If the description of the property is changed owing to difference in the value of the property owing to causes which are beyond the control of anybody, the decree-holder may recover damages in a regular suit and not in the proceedings under O. 21, r. 71. 16 C. 535. The words "shall forthwith be re-sold" include "shall forthwith be put up for sale." Hence when the property is put up for re-sale and the conducting officer has adjourned the sale and continued it until he obtained a bid, the decree-holder is entitled to apply for the recovery of the deficiency, if any, from the defaulting purchaser. 1926 M. 739.

CERTIFICATION OF EXPENSES.—The preparation of a certificate of expenses is not a condition precedent to the allowance of the deficiency by the Court. It is not an essential preliminary to the order by the Civil Court; and it may at the instance of the judgment-creditor or the judgment-debtor order a recovery of the deficiency. 19 A. 22.

NOTICE.—Execution for difference cannot be made unless an order has been made, and the latter should be made after a notice calling upon the defaulter to make up the deficiency. 20 W.R. 80.

LIABILITY AS PRINCIPAL OR AGENT.—A person in order to take advantage of S. 230 (1) of the Indian Contract Act, must allege and prove that when making the bid or before doing so he had informed the Court Officer who was acting on behalf of the Court in selling the property that he was making the bid only as the agent of some named third person. 46 M.L.J. 134=78 I.C. 296. If at an auction sale held under the C.P. Code for any good cause the auctioneer does not accept as purchaser the person named by the highest bidder as his principal, he cannot make the bidder himself purchaser against his will. He must simply declare that there is no sale and re-open the bidding. When a person held himself out as agent only for another and the latter was accepted as the purchaser on his bid, and the judge conducting the sale wrote down the agent's statement that he was acting as agent, then in case of re-sale the principal is considered as the apparent purchaser and the person liable for the deficiency. 20 W.R. 80. A purchaser at an auction sale in the character of an agent cannot be made liable as a principal. A proceeding under O. 21, r. 71, must be taken against the party who was the principal in the case. 20 W.R. 397. If the agent had no authority for his principal to make the purchase, he may be made liable on that ground either that he falsely represented himself as having authority or that by acting in the way he undertook that he had authority in those proceedings. 20 W. R. 397. Where A purchased "as mother and guardian of her minor son" the minor was the real purchaser. 12 W.R. 236.

VI.—SETTING ASIDE SALES.

SALE WHEN TO BECOME ABSOLUTE OR BE SET ASIDE.—(1) Where no application is made under rule 89, rule 90 or rule 91, or where such application is made and disallowed, the Court shall make an order confirming the sale and thereupon the sale shall become absolute.

(2) Where such application is made and allowed and where in the case of an application under rule 89, the deposit required by that rule is made within thirty days from the date of sale, the Court shall make an order setting aside the sale: Provided that no order shall be made unless notice of the application has been given to all the persons affected thereby.

(3) No suit to set aside an order made under this rule shall be brought by any person against whom such order is made. (O. 21, r. 92.)

LEGAL CHANGES.—This rule covers applications under rr. 89, 90 and 91; while under the old Code the corresponding S. 312 mentioned only applications under S. 311 (corresponding to S. 90 of the new Code).

SCOPE.—Setting aside sale of only some of the property.—A Court can set aside an execution sale as regards some only of the properties put up for sale at an auction sale without setting aside the sale of others. 9 C. 656; 18 C.W.N. 947=24 I.C. 64. An execution sale is a good sale until it is set aside and it cannot be set aside by a defence in derogation thereof in an action for recovery of possession by the purchaser. 38 I.C. 47.

APPLICABILITY OF THE RULE.—The provisions of O. 21, r. 92, requiring notice to be served does not apply to a suit to set aside a sale under S. 174 of the Bengal Tenancy Act. 61 I.C. 126=2 Pat. L.T. 66. Under the rules framed by the Government under S. 68 and 70, C. P. Code, corresponding to O. 21, r. 92, to deal with execution sales by Collector, the order of confirmation by the Collector is final and no suit lies against it. 45 A. 203 F.B.

Public Demands Recovery Act.—No suit lies to set aside a sale on the ground of non-service of notice under the Public Demands Recovery Act (Act I of 1895). It is barred by O. 21, r. 92 (3) and S. 47, C.P. Code. 34 C. 787 (35 C. 286 on appeal).

APPLICATION.—For restoration.—An order restoring or refusing to restore an application, for setting aside a sale, dismissed for default is not appealable, as it is not one under O. 21, r. 92. 25 P.R. 1907; 10 O.C. 171; 5 O.C. 29; 27 C. 414; 4 C.W.N. 39; 10 B. 433; 11 M. 919; 31 C. 207; 29 A. 596; 10 O.C. 353.

NOTICE.—The notice mentioned in the proviso to cl. (2) of r. 92 need not be given within 30 days mentioned in r. 92. 97 B. 387; 68 I.C. 238=9 O.L.J. 211; 1926 P. 266. A sale cannot be set aside without notice to the auction-purchaser who

can appeal in case an order is passed against him. 62 I.O. 986 (L.) ; 8 L.L.J. 463. An auction-purchaser is entitled to appeal against an order setting aside a sale which was done without a notice to him. 15 O.W.N. 685=10 I.C. 148. The object of O. 21, r. 92, is to give due notice of the application for setting aside a sale to all parties concerned and give them an opportunity of contesting it, so that no order may be passed to the prejudice of any party behind his back. This object will be equally achieved if the party has otherwise notice of the application. 80 I.O. 931.

NOTICE TO ALL THE PERSONS AFFECTED.—The purchaser of a property from a decree-holder which the latter purchased at a sale in execution of his decree cannot treat as a nullity subsequent proceedings of the executing Court in which the execution sale is set aside with notice to the decree-holder, but without notice to the purchaser, as such proceedings being good proceedings against the decree-holder are good also as regards the purchaser who claims through the decree-holder. 41 I.C. 200. Persons who had obtained orders for rateable distribution of the proceeds of an execution sale are persons affected by an order within the meaning of O. 21, r. 92, and an order behind their back cannot bind them. 35 M.L.J. 604=48 I.C. 38. The heirs of a deceased decree-holder are persons affected by the sale. 75 I.C. 863=5 Pat. L.T. 233. R. 92 does not make it obligatory on the applicant to pay the process fee or to serve notice according to the mode of service prescribed in the Code for every case, on all persons affected by the sale. 67 I.O. 286. An order setting aside an execution sale under r. 90 without giving proper notice to the parties as required by r. 92 is without jurisdiction and is of no effect. 2 Pat. L.T. 270=62 I.C. 113 ; 32 I.C. 891. A notice to the judgment-debtor or his legal representative is necessary before setting aside a sale under the rule. 7 B. 424. No order shall be made setting aside a sale without notice to all the parties affected thereby. 75 I.O. 863 ; 68 I.O. 238 ; 75 I.C. 430=2 P. 800 ; 75 I.O. 46=45 M.L.J. 413. It is not necessary to make all the persons affected by the sale parties to the application. A notice to them is necessary before setting aside a sale under O. 21, r. 92. 1926 P. 266. An auction sale cannot be set aside in a proceeding to which the auction-purchaser was not a party. 15 I.O. 228 ; 5 I.O. 305=11 O.L.J. 86 ; 75 I.O. 863. In a proceeding for the reversal of the execution sale the person whose property is sold must be a party. 20 O.L.J. 469=27 I.C. 139. The order under O. 21, r. 92, does not affect a stranger to the proceedings who has a claim to the property. 24 I.O. 44=1 L.W. 412.

LIMITATION.—The period of limitation for an application to set aside a sale is thirty days under O. 21, r. 92 (2) from the date of the sale. 50 I.C. 914.

Date of sale.—A sale of immovable property in execution of a decree is not complete until the officer conducting the sale has accepted the final bid and the purchaser has paid the deposit required by O. 21, r. 84, C.P. Code. The *terminus a qua* for the period of 30 days provided by O. 21, r. 92 (2) must therefore be deemed to be the date of deposit. 50 I.C. 914 ; 17 I.C. 738.

SUIT TO SET ASIDE THE ORDER.—The corresponding S. 312 of the old Code of 1882 applied only to applications referred to in S. 311 (corresponding to r. 90 of the present Code). The present rule applies also to applications referred to in rr. 89, and 91 ; also see 24 A. 379 F.B. ; 25 B. 337 P.C. ; 39 A. 144 ; 26 B. 40 ; 7 I.C. 503 ; 42 I.C. 453 ; 1923 B. 62. No suit lies on the ground of fraud or material irregularity after an execution sale has been confirmed. 44 M. 351. A suit does not lie to set aside an order confirming the sale under O. 21, r. 92. 16 O. 33 ; 26 B. 40 ; 29 A. 196 P.C. ; 7 A. 450 ; 10 A. 127 ; 1926 L. 165=7 L. 1 ; 1926 O. 45=89 I.C. 107. Under the rules framed by the Government under Ss. 68 and 70, C.P. Code,

corresponding to O. 21, r. 92, C.P. Code, to deal with execution sales by the Collector the order of confirmation by the Collector is final and no suit lies against it. 45 A. 208 F.B. Where a decree has been passed and set aside by the fraud and collusion of the judgment-debtor in favour of a third person in order to put a burden on the property to be sold and after sale to set aside the decree, a suit is maintainable to set the sale aside and a resale may be ordered. 78 I.C. 108. The provisions of r. 92, preclude a defendant judgment-debtor from asking the court in a suit by the decree-holder for possession to go into a question which affects nothing but the regularity of the sale. 28 C.W.N. 821=78 I.C. 126; see 91 I.C. 226. Under the old Code the auction-purchaser was entitled to recover the purchase money by a suit when the judgment-debtor was found to have no saleable interest. Under the present Code no suit lies, but an appeal lies. 37 O. 67; 22 B. 783; 40 M. 1009; 40 A. 411. The law is changed in this respect, and the remedy by suit is no longer available. 39 A. 114; 39 M. 803; 40 M. 1009; 43 A. 60; 50 O. 115. When certain joint family property is sold in execution of a decree against some of the members of the family and an application also by them is dismissed under O. 21, r. 92, a suit by another member is maintainable, but those members whose application under r. 90 is dismissed have no cause of action. 91 I.C. 218=8 N.L.J. 184.

Any person against whom such an order is made.—Clause (3) of r. 92 does not bar a suit by a person whose objection under r. 89 has been disallowed when he was neither a party to the suit in which the decree was passed nor to the execution proceedings which followed the decree. 104 P.R. 1916=36 I.C. 212. When a person whose claim to certain property sought to be sold as the property of the insolvent has been defeated by a suit to establish his right, such a suit is not barred by O. 21, r. 92, C.P. Code. 73 I.C. 367=5 L. L.J. 9. Rule 92 does not bar a suit for a declaration that the auction sale is void on the ground of collusion and fraud, not only of the decree-holder and the auction-purchaser, but of certain other persons also. 22 A.L.J. 1060=L.R. 6 A. 89.

COURT.—The "court" in this rule means the Civil Court and not the "Collector" when the case is transferred for execution to the Collector. 40 A. 425.

APPEAL.—An appeal lies from an order under this rule setting aside or refusing to set aside a sale under O. 43, r. 1 (j). 14 I.C. 310; 13 M.L.J. 123; 12 I.C. 169; 16 A.L.J. 433; 79 I.C. 351; 2 A. 352; 4 Pat. L.T. 735; 4 L. 243; 40 A. 425; 77 I.C. 522=1922 C. 180; 91 I.C. 962. An appeal lies under O. 21, r. 92, and O. 43, r. 1 (j), against an order of an executing Court refusing to receive the amount of the decree and costs from such a mortgagee as can apply under O. 21, r. 89. 178 P.W.R. 1911; 12 I.C. 733. No appeal lies by a judgment-debtor under O. 43, r. 1 (j), from an order of the executing court refusing to set aside a sale in execution of a decree, if his application cannot come within the provisions of O. 21, r. 83, or O. 21, r. 92. 72 P.R. 1910. An order setting aside a sale *suo moto* by the Court is not an order under r. 92 and hence is not appealable. 86 I.C. 1045=1925 S. 101. Under the old Code no appeal lay unless the order came under S. 244 of the old Code (corresponding to S. 47 of the present Code). 19 A. 140. An auction-purchaser is entitled to appeal against an order setting aside a sale which was done without notice to him. 15 C.W.N. 685=10 I.C. 148; 3 L. L.J. 463. An order setting aside execution sale without notice to the purchaser is appealable at the instance of the auction-purchaser. 3 L.L.J. 468. No appeal lies from an order dismissing an application to set aside a sale on default of appearance under O. 43, r. 1 (j) nor is it revisable under S. 115. 1926 C. 773=30 C.W.N. 570.

COURT OF APPEAL.—An order of the District Court dismissing an application to set aside a sale under O. 21, r. 92 of C.P. Code, is not a decree but an appealable order and therefore an appeal against such an order lies to the Divisional Court even in a case in which the value of the subject-matter is above Rupees 10,000. 39 I.C. 372 = 11 Bur. L.T. 8.

SALE BY COLLECTOR.—If the execution proceedings were transferred to the Collector under S. 68 of the Code and sale effected no suit lies to set it aside. It is barred by O. 21, r. 92 (3). The proper remedy of the judgment-debtor objector is to file an appeal from the order of dismissal of application for setting aside sale. The appeal lies to the commissioner as provided by S. 45 of the Rules of Local Government. (U.P. Gazette, 1911). 35 I.C. 473.

Bombay.—In execution proceedings held before a Collector, when once an application is made within time limited by law to the Collector to set aside the sale, the Collector is bound to refer the application to the Court under civil circulars. As soon as the application is so made to the Collector, all his powers for confirming the sale are suspended until the application has been disposed of. If the Collector notwithstanding the reference of the application to the civil Court proceeds to confirm the sale, it is open to the judgment-debtor to file a suit to set aside the sale when the auction-purchaser is a third party. 44 B. 551.

PARTIES TO APPEAL.—An appeal, against an order confirming an auction sale to which the auction purchasers were not made parties till long after the appeal was time-barred as against them, should be dismissed. 1 L. 21.

Right of the certified and real purchasers to appeal.—Though the certified purchaser has been found to be a *benami* purchaser by the lower Court he has yet the right of appeal against an order setting aside the sale. 3 M.L.J. 255.

COURTS TO HEAR APPEAL.—When the applicant was a creditor for a sum less than Rs. 5,000, the appeal lies to the High Court when the sale took place in a suit for a sum over Rs. 5,000. 11 B.H.C. 15 ; 8 C. 367 ; 15 O. 489 F.B. ; 20 O. 418 ; 29 O. 548.

SECOND APPEAL.—No second appeal lies from an order under O. 21, r. 92 38 C. 339 = 11 Bur. L.J. 26 ; 39 I.C. 374 ; 56 I.C. 646 ; 41 I.C. 753 ; 40 A. 122 ; 2 P.W.R. 1919 ; 41 I.C. 121 ; 6 L. 250 ; 168 P.R. 1919 ; 88 I.C. 559 ; 91 I.C. 213 ; 8 I.C. 833 = 9 M.L.T. 171 ; 66 I.C. 929 = 25 O.O. 78 ; 1923 L. 287 = 72 I.C. 788 ; 28 C. 4 ; 39 C. 687 ; 4 L. 243 ; 6 I.C. 573 ; 15 O.W.N. 685 ; 87 I.C. 413 = (1925) M.W.N. 701 ; 90 I.C. 228 ; 1926 L. 204 = 91 I.C. 213. When an auction sale is sought to be set aside on the ground that no notice was issued under O. 21, r. 92, and the application is rejected, the order does not fall under S. 47 and hence there is no second appeal. 4 Pat. L.T. 721 = 74 I.C. 838. An order confirming or setting aside a sale under O. 21, r. 92, is appealable under O. 43, r. 1 (j), and hence under S. 104, C.P. Code, no second appeal lies from such orders. 4 L. 243 ; 1926 C. 400 = 90 I.C. 228. Under S. 104 of the C.P. Code an order under O. 21, r. 92 setting aside a sale is subject to only one appeal and no second appeal is allowed. 168 P.R. 1919. When a sale was set aside with the consent of the judgment-debtor and the decree-holder and the auction purchaser appealed and the sale was confirmed in appeal, no second appeal by the judgment-debtor is competent. 62 I.C. 986 (L.). The mere fact that the judgment-debtor impeached the sale not only on the ground of fraud in the proclamation of sale but also on the ground of fraud antecedent to the publication did not give a right of second appeal. 40 I.C. 426 = 25 C.L.J. 399. But see 10 I.C. 625. When a plaint in a suit to set aside a sale on the ground of irregularity or fraud is

treated as an application under O. 21, r. 90, by the appellate Court no second appeal lies from an order passed on the plaint. 1926 O. 229=87 I.C. 555.

Second appeal, when the auction-purchaser is the decree-holder himself.—According to the Bombay High Court no second appeal lies from an order passed under r. 92 even if the auction-purchaser is the decree-holder himself. 44 B. 472 ; 36 I.C. 769 ; 30 M.L.J. 611. Where parties disputing the validity of the sale are parties to the suit they approach the Court under S. 47 and a second appeal lies to the High Court. 47 M.L.J. 549=84 I.C. 975.

LETTERS PATENT APPEAL.—An order of a single Judge of the High Court dismissing an appeal from an order of the Court executing the decree refusing to set aside the sale under O. 21, r. 90 is not appealable under clause 10 of the Letters Patent, Allahabad. 39 A. 191 ; 27 A. 226.

REVISION.—The High Court cannot interfere in revision in the case of an order refusing to set aside a sale even though the order of the lower Court be erroneous. 40 A. 425 ; 79 I.C. 351 ; 6 C.W.N. 57 ; 28 A. 84 (*contra* in 71 I.C. 1018=21 A.L.J. 162). When a sale is set aside on an application under O. 21, r. 92 being made after the period of limitation the High Court can interfere in revision. 13 M.L.J. 231. Where the lower appellate Court set aside the order of the lower Court and set aside the confirmation of sale under O. 21, r. 92 the High Court interfered in revision. 92 P.R. 1907.

APPEAL TO THE PRIVY COUNCIL.—An appeal lies to the Privy Council from an order setting aside or refusing to set aside a sale. 40 C. 635.

ORDERS UNDER O. 21, R. 92.—An order dismissing an application under O. 21, r. 90 for non-appearance of the applicant amounts to an order under O. 21, r. 92 and is therefore appealable under O. 43, r. 1 (j). 14 C.W.N. 573=5 I.C. 493 ; 38 I.C. 63 ; 79 I.C. 351 (*contra* held in 56 I.C. 981).

Orders refusing to restore the case.—An application to set aside a sale under O. 21, r. 90 having been dismissed for default, the applicant applied for restoration of the case, but the application was refused, *held* that no appeal lay against an order refusing to restore the case. 27 I.C. 492=19 C.W.N. 25 ; 56 I.C. 981 ; 1926 L. 109=89 I.C. 360.

ENQUIRY.—The Court is bound to try the validity of the judgment-debtor's objection to the sale of the attached property. 24 W.R. 85. The issue which arises in a proceeding when a petition is preferred under these rules is a judicial proceeding and ought to be carried out with regularity. Upon the petition being filed, the Court ought to fix a day for the hearing of the matter of the petition and give reasonable notice thereof to all parties. 20 W.R. 424. The Court should make an investigation into the circumstances attending the sale which was objected to by the judgment-debtors and ought not to rely on the mere report of the nazir. It is imperative on the Court to take up each objection separately and determine it specifically recording the reasons for the findings arrived at in respect of it. 2 N.W.P. 142.

NATURE OF PROCEEDINGS TO SET ASIDE SALE.—A proceeding to set aside a sale under r. 90 is not a proceeding in execution as the execution proceedings ordinarily end with the sale resulting with the full or part satisfaction of the decree. 62 I.C. 608=6 Pat. L.J. 253.

OBJECTIONS TO SALE.—A judgment-debtor can object to the execution proceedings on the ground that the Court is precluded from selling the property (*e.g.* an occupancy holding) and that the Court should carry out the provisions of law and not act in violation thereof. 43 A. 547.

TIME FOR TAKING OBJECTION TO SALE.—Even though the sale is held in violation of the provisions of S. 99, T. P. Act, it is the duty of the mortgagees (judgment-debtors) to object to the sale or the confirmation of the sale before the sale is confirmed. The representative of the judgment-debtor cannot question its validity. 2 A.L.J. 123; 30 A. 146. An application to set aside a sale on the ground that the application for attachment and sale was barred by limitation cannot be made after confirmation of sale. 2 Pat. L.J. 157. An objection to an execution sale on the ground of fraud can only be taken prior to the confirmation of the sale. 51 I.O. 447 but see *contra* in 30 C. 142; 1922 P. 422. Where the judgment-debtor or his transferee had notice of the execution proceedings, and had an opportunity to object but failed to do so, he is bound by the order confirming the sale. 1926 M. 12=91 I.O. 443. See also 9 C.W.N. 972; 26 C. 727, 34 C. 199; 40 A. 680.

LIABILITY FOR COSTS OF SALE.—When an execution sale is set aside on the ground of irregularity under O. 21, r. 90 the judgment-debtor is not chargeable with the expenses of the sale so set aside. 1 Agra Mis. App. 1.

SETTING ASIDE SALES ON DEPOSIT.

APPLICATION TO SET ASIDE SALE ON DEPOSIT—(1) Where immovable property has been sold in execution of a decree, any person either owning such property or holding an interest therein by virtue of a title acquired before such sale, may apply to have the sale set aside, on his depositing in Court—

- (a) for payment to the purchaser, a sum equal to five per cent. of the purchase money; and
- (b) for payment to the decree-holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered less any amount which may, since the date of such proclamation of sale have been recovered by the decree-holder.

(2) Where a person applies under rule 90 to set aside the sale of his immovable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule.

(3) Nothing in this section shall relieve the judgment-debtor from any liability he may be under in respect of costs and interest not covered by the proclamation of sale. (O. 21, r. 89.)

APPLICABILITY OF THE RULE.—The provision of O. 21, r. 89 apply to sales under Act X of 1859=38 O. 832. The rule applies to sales under the Public Demand's Recovery Act. 22 I.O. 95. The provisions of O. 21, r. 89 may ordinarily apply to sales on mortgage decrees after attachment under the O.P. Code, but they do not apply to a suit on the original side of the High Court where without attachment the sale has been held by the Registrar in conformity with the rules of the Court. The practice under the rules of the High Court and the C. P. Code are not workable together in this respect. 24 C.W.N. 536=59 I.C. 432; 24 O.W.N. 1032=60 I.C. 406=48 O. 69. This rule applies to sales in execution of mortgage decrees. 22 M. 286; 25 M. 244 F.B.; 31 C. 863; 31 M. 354; 10 M.L.J. 228. This rule does not apply to sale of mortgaged property under the T.P. Act. 25 O. 703 F.B. (23 O. 682 overruled; 19 A. 205 dissented from.) 8 C.W.N. 102; 2 C.W.N. 127 (*contra* in 25 B. 104; 31 A. 346) 30 M. 507; 1 O.O. 193.

Decrees under the Rent Act.—The provisions of O. 21, r. 89 apply to sales in execution of a decree for recovery of arrears of rent under the Bengal Rent Act. 38 O. 832; 15 C.W.N. 863; 13 O.W.N. 224=4 I.C. 474. This rule applies to a sale of a tenure in execution of rent decree for its own arrears. 23 O. 393; 1 O.W.N. 114=8 C.W.N. 55; 8 O.L.J. 305; 6 O.W.N. 57.

This rule does not apply to a sale held in a partnership suit for the realisation of partnership assets, and rule 214 of the Original Side Rules only applies to cases to which r. 89 of the Code is applicable. 41 M.L.J. 465=(1921) M.W.N. 736. The provisions of O. 21, r. 89 do not apply to proceedings held by the Collector in execution of a decree under Ss. 68 and 71 of the O.P. Code. 25 A. 167; see also 31 A. 281. This rule applies to sales in enforcement of a decree based on the award. 27 O.W.N. 466=1923 O. 582.

OBJECT AND SCOPE.—This rule is intended to keep out strangers and the right of pre-emption arises only when the bid is made by a stranger and not a co-sharer though that co-sharer is one in a different *patti*, but in the same *Mahal*. 12 A.L.J. 1148=26 I.C. 95. A Court has no power to set aside a sale unless the judgment-debtor strictly complies with the provisions of the rule. 23 B. 723. O. 21, rr. 89, 90 and 91 presuppose a valid decree under which the sale is held and r. 92 does not affect the power of the Court to confirm the sale or make it compulsory to confirm the sale when the Court finds that the sale was held under a decree which did not authorise the sale. 55 I.C. 547=24 O.W.N. 73. The provisions of law must be very strictly conformed to before a sale is set aside under this rule. 28 M.L.J. 262; 80 I.C. 444=27 O.O. 89.

WHO CAN APPLY UNDER THIS RULE.—Under the old Code of 1882 the Application to set aside the sale could be made only by "any person whose immoveable property has been sold." Under the present Code, the words, "any person either owning such property or holding an interest therein by virtue of a title acquired before such sale" have been substituted for the words "any person whose immoveable property has been sold." The present rule is wider than the corresponding S. 310-A of the old Code of 1882. 23 C.W.N. 597=52 I.C. 237.

A co-sharer landlord who obtains a money decree in respect of his share of the rent of a non-transferable occupancy holding and purchases the holding in execution of the decree obtains nothing tangible by the purchase and has no *locus standi* to make a deposit under O. 21, r. 89. 1924 P. 513.

A co-sharer may apply under this rule. 30 A. 192; 195, 196 (*contra* in 30 O. 425).

A mortgagee of immoveable property is entitled to pay the amount of the decree and costs in order to get the property released from attachment even after it is sold to

the highest bidder and the mortgage has taken place after attachment. 30 B. 575 ; 8 Bom. L.R. 578 ; 178 P.W.R. 1911=12 I.C. 733 ; 29 O. 1 F.B. ; 21 M. 416 ; 33 A. 481 ; 13 A.L.J. 273=27 I.C. 831 ; 27 M.L.T. 130=53 I.C. 958 ; 8 A.L.J. 359 ; 30 M. 507 ; 13 C.W.N. 224 ; 11 C.W.N. 742. A mortgagee in possession is competent to apply under r. 89 to set aside a sale of the property. 25 O.C. 78=66 I.C. 929 ; 35 B. 288 ; 20 A.L.J. 42. A mortgagee can apply even though the property is sold subject to a mortgage. 53 I.C. 958=27 M.L.T. 130. When the mortgagee of a non-transferable occupancy holding which was brought to sale in execution of a rent decree and purchased by the landlord decree-holder, sought to deposit in Court the decretal amount and compensation under O. 21, r. 89, *held* that the mortgagee had no interest under the rule and so his deposit could not be accepted by Court. 29 I.C. 916 ; 16 C.W.N. 421. When a person held two mortgages on certain property and obtained a decree for sale, and another money decree against the mortgagor and in execution of the latter brought the hypothecated property to sale, and the property was purchased by a stranger, the decree holder was not entitled to apply under O. 21, r. 89 to set aside the sale on the ground that either the property was sold as free from mortgages or subject to them, and in neither case was he a person having an interest in the property sold. If the property was sold free from mortgage, he must be deemed to have abandoned them ; if it was sold subject to them, the sale only related to the interest of the mortgagor, that is, his equity of redemption, and in this case the mortgagee had no interest. 33 A. 481 ; see also 8 A.L.J. 356. A second mortgagee who was not a party to a suit by the first mortgagee is not entitled to set aside a sale in execution of a decree in favour of of the latter. 26 M. 392. A person who acquires a mortgage in trust from the judgment-debtor of the properties sold in execution sale subsequent to the Court sale is not a person entitled to apply to set aside the sale under O. 21, r. 89. 39 M.L.J. 84 F.B.=58 I.C. 856 F.B. A mortgagee who has purchased equity of redemption in one portion of the mortgaged property can apply under O. 21, r. 89 to set aside the sale held under his own decree. 74 I.C. 102=1923 P. 490. A prior mortgagee in possession of the property has a right to apply under this section. 87 I.C. 829=28 O.C. 221.

A co-heir can apply under this rule. It is not confined to transferees from judgment-debtor. 30 C. 425.

A reversioner is interested in making a deposit of the decretal amount due by a Hindu widow to cancel a sale. 18 C.W.N. 778=21 I.C. 207. A reversioner of a Hindu widow's estate is entitled to apply under O. 21, r. 89. 4 Pat. L.J. 360=(1919) Pat. 803=51 I.C. 359.

A *durmukararidar* is a person whose immoveable property has been sold within the meaning of O. 21, r. 89 and as such he is entitled to have a sale in execution of a rent decree of a *Mukarari* tenure set aside. 32 C. 107 ; 11 C.W.N. 742 (*contra* in 5 C.W.N. 132).

An under-*raiyat* under the judgment-debtor can apply under O. 21, r. 89, as being a person whose immoveable property has been sold in execution of a decree for arrears of rent due in respect of the superior holding. 11 C.W.N. 742 ; 32 C. 107 ; 29 O. 1 F.B. ; 8 C.W.N. 55 ; 8 C.W.N. 232 ; 13 C.W.N. 224=4 I.C. 474 (*contra* in 29 O. 459). Where the provisions of the Eastern Bengal and Assam Tenancy Act apply, a Permanent under-tenure holder has a *locus standi* to apply under O. 21, r. 89 to set aside the sale of a Taluk in execution of a rent decree. 23 C.W.N. 597=52 I.C. 237. The *interim* receiver by virtue of his appointment under S. 20 of the Provincial Insolvency Act cannot apply under this rule in the absence of Court's order authorising him to do so. 1926 M. 357=93 I.C. 271.

A beneficial owner is entitled to apply for setting aside a sale in execution of a decree against the benamidar, as being a person whose immoveable property has been sold. 8 O.L.J. 305 ; 1 C.W.N. 135 ; 23 A. 478.

A benamidar of a person whose immoveable property has been sold has a right to apply. 1 O.W.N. 195; 29 C. 1 F.B.

Purchasers of portions of property.—A purchaser at a private sale from a judgment-debtor of a portion only of certain properties, which are subsequently sold in execution of a decree is not entitled to ask that the execution sale be set aside on the ground that the amount of the decree has been fully paid by himself and other purchasers of the rest of the property. 52 I.C. 641. The purchaser of a share of an occupancy holding transferable by custom can apply under O. 21, r. 89, to set aside the sale in execution of a decree for arrears of rent. S. 88, T. P. Act, does not imply that such a purchaser has no interest in the property for the purposes of the rule. 8 O.W.N. 55; 32 C. 107; 9 O.W.N. 134; 11 C.W.N. 742; 7 C.L.J. 272, 282; 8 C.L.J. 161; 13 C.W.N. 224; 8 C.W.N. 232. In execution of a decree against a purchaser of an occupancy holding who succeeded in getting possession of only a share of it, the other portion remaining in the possession of the old tenant, the latter is entitled to apply under O. 21, r. 89, 5 I.C. 561.

A person who has agreed to purchase the property cannot apply under this rule, for a contract does not create any interest in the property. 23 B. 181; 17 L.W. 680=1923 M. 659.

A tender by a person who is neither the general nor the special attorney, nor the wakil, nor the mukhtar of the owner of the property sold is not sufficient within the meaning of this rule. 9 A.L.J. 12=13 I.C. 404.

A stranger purchaser of the occupancy holding which is not transferable without the consent of the landlord at an execution sale has no *locus standi* to make the application to have the sale for arrears of rent set aside under r. 89. 20 O.W.N. 40=28 I.C. 182.

Persons who have no title to possession, but expect to get as the result of a pending litigation, are not entitled to apply. 42 I.C. 839. A private purchaser from a person of property which is subsequently sold in execution of a decree obtained against the vendor is not entitled to apply under the rule, 23 B. 450; 2 O.W.N. 243.

A purchaser from the judgment-debtor after the sale in execution has no right to apply. 34 A. 186; 52 I.C. 186; 52 I.C. 344; 26 O.W.N. 149; 1922 L. 302; 1 O.W.N. 279; 44 M. 554 F.B., overruling 38 M. 775 and other similar rulings in which it was held that a vendee from the judgment-debtor after sale had a right to apply. 1926 A. 204=24 A.L.J. 69 F.B.; 40 B. 557; 51 I.C. 873=4 Pat. L.T. 340.

A person who has purchased the property pending attachment cannot apply under the rule. 17 L.W. 680=1923 M. 659.

A donee of property after its attachment but before sale can apply under this rule because his interest is affected thereby; but if the gift was made before attachment he has no right to apply as his interest in the property sold is not affected by such sale. 26 M. 365; 8 O.C. 189; 30 M. 214; 30 M. 507.

A transferee from the judgment-debtor of immoveable property attached in execution of a decree for money becomes the owner of the property and is competent to make an application under O. 21, r. 89. 28 O.L.J. 127=36 I.C. 510; 30 B. 575; 3 O. C. 189; 26 M. 365.

A person who has purchased the property from the judgment-debtor before attachment and whose claim under O. 21, r. 58 being dismissed, a regular suit as brought under O. 21, r. 63, is not entitled to apply under the rule. 7 C.W.N. 243.

A person whose claim under r. 58 of O. 21, and a suit under r. 63 have already been dismissed has no right to apply under this rule. 21 N.L.R. 102=90 I.C. 963.

An attaching creditor of the property has no right to apply under the rule. 13 A.L.J. 401=28 I.O. 948 ; 6 O.W.N. 57.

One of the judgment-debtors.—Where an application is made under O. 21, r. 89 by one of the judgment-debtors, he cannot take advantage of the amounts paid into Court by his co-judgment-debtors which have not been accepted by the decree-holder, and he cannot hence deposit only the balance. 39 M. 429. When a mortgage decree is passed under S. 88. T.P. Act the judgment-debtor has the right to apply under r. 89, 23 O. 682. Where a judgment-debtor whose property has been sold by auction, conveyed it by private sale to a third person, but the deed of conveyance was not registered, although the time for registration had expired on the date of application under O. 21, r. 89, held that the judgment-debtor continued to be the owner of the properties so as to entitle him to apply under this rule. 42 M. 503. A judgment-debtor who after the sale in execution of his immoveable property sells the property to a third person is not entitled to apply under this rule. 34 A. 186 ; 14 O. C. 33=9 I.O. 745 ; 54 I.O. 753 ; 40 M.L.J. 16 ; (38 M. 775 overruled in 44 M. 554 F.B.). A contrary view is taken by the Patna and Bombay and Madras High Courts which hold that a judgment-debtor who subsequently to the sale of his immoveable property in execution has sold his property privately may apply to have the auction sale set aside. (1921) Pat. 364 ; 40 B. 557, 4 Pat. L.T. 340=51 I.O. 873 ; 44 M. 554 F.B. ; 14 O.C. 33 : 52 I.O. 344. The recent ruling 1926 A. 204=24 A.L.J. 69 F.B., of the Allahabad High Court approves the view taken by the Bombay High Court in 40 B. 557 and the view in 34 A. 186 is dissented from. A judgment-debtor who mortgages his property sold in execution proceedings can apply under this rule. 86 I.O. 731=1925 O. 349.

Legatee of the judgment-debtor.—When a person claiming as a legatee under a will applied to pay the decretal amount to prevent a sale but the application was dismissed, it does not bar an application under O. 21, r. 89. The effect of the previous dismissal was to decide that the applicant had no right to raise the attachment on payment of the decretal-amount. 44 M.L.J. 325=72 I.O. 325.

A trespasser in possession of property sold in execution of a decree has sufficient interest in the property to entitle him to make an application under O. 21, r. 89. 20 L.W. 31=79 I.O. 874.

CONDITIONS REQUIRED FOR SETTING ASIDE SALES UNDER O. 21, R. 89.

THERE MUST BE AN APPLICATION.—There must be an application oral or written to set aside a sale under this rule. 32 I.O. 783=3 L.W. 174 ; 13 I.O. 404 ; 87 I.C. 437=1925 M. 639 ; 86 I.C. 498=1925 M. 909. A mere deposit of the decretal amount within 30 days unaccompanied by an application to set aside a sale is not sufficient. 43 B. 735 ; 66 I.O. 44=(1922) M.W.N. 171 ; 32 I.O. 45 ; 87 I.O. 437 ; 87 I.C. 722=1925 O. 411 ; 86 I.O. 498. A mere lodgment schedule without any prayer to set aside the sale is not sufficient. 86 I.O. 44=(1922) M.W.N. 171.

APPLICATION UNDER RULE 89.—An application under the rule need not be in writing or signed by the applicant or his pleader. 14 M.L.T. 534=22 I.O. 291 ; 13 I.O. 404=9 A.L.J. 12 ; 32 I.O. 45 ; 3 L.W. 174=32 I.O. 783 ; 63 I.O. 140 (A.). A sale in execution cannot be set aside under O. 21, r. 89 without an application oral or written within 30 days. 32 I.O. 783=3 L.W. 174 ; 66 I.O. 44=(1922) M.W.N. 71. Mere payment of money under O. 21, r. 89 without an application to set aside the sale is not sufficient. 32 I.O. 45 ; 13 I.O. 404=9 A.L.J. 12 ; 9 I.O. 39. A judgment-debtor paid the amount with a prayer in his application that it may not be paid

to the decree-holder pending the disposal of an appeal. Subsequently on the objection of the decree-holder to withdraw the prayer aforesaid the judgment-debtor did it and it was held that the object of the deposit was to set aside the sale and though there was no specific prayer to that effect, the objection to payment of the amount deposited being withdrawn, the Court is bound to set aside the sale. 71 I.O. 332=4 Pat. L.T. 295; 68 I.O. 629. When after the execution sale the judgment-debtor deposits the decretal amount as well as the penalty of 5 per cent., the application must be deemed to be one also for having the sale set aside. 63 I.O. 140 (A.)

Restoration of application.—It is quite open to the Court to treat a second application as one for review when the first application is dismissed for default and to set aside a sale under O. 21, r. 89. 12 I.O. 351=22 M.L.J. 148. When the application of the judgment-debtor under this rule is dismissed for default, O. 9, r. 9, does not apply to such an application, it being considered as an application in execution proceedings. 1926 B. 377 (44 C. 950 and 19 C.W.N. 758=29 I.O. 395, dissented from in which a contrary view was taken).

THE APPLICANT MUST PAY INTO COURT A SUM EQUAL TO FIVE PER CENT. OF THE PURCHASE MONEY AS A COMPENSATION FOR HIS TROUBLE AND DISAPPOINTMENT FOR THE BARGAIN, TO THE PURCHASER. 22 M. 286; 26 C. 449. The amount of five per cent. paid by one of the owners to the auction-purchaser to avert the sale of the property and the auction fees are not amounts coming under r. 89 and cannot be included in the calculation of the liability of the several properties comprised in the sale. 36 A. 272. When the decree-holder is the auction-purchaser he is not relieved from paying the 5 per cent. required by this rule. A.W.N. (1895) 140.

THE APPLICANT MUST DEPOSIT INTO COURT FOR PAYMENT TO THE DECREE-HOLDER THE AMOUNT SPECIFIED IN THE PROCLAMATION OF SALE AS THAT FOR THE RECOVERY OF WHICH THE SALE WAS ORDERED LESS ANY AMOUNT WHICH MAY SINCE THE DATE OF SUCH PROCLAMATION OF SALE HAVE BEEN RECEIVED BY THE DECREE-HOLDER and not the decretal amount. 71 I.O. 1018=21 A.L.J. 162. In an application to set aside a sale on deposit under this rule it is necessary to deposit only the amount specified in the sale proclamation as that for the recovery of which the sale is ordered and not the amount of the decree of other judgment-creditors who are entitled to rateable distribution. 23 M.L.J. 585=17 I.C. 920; 37 B. 387; 1926 M. 766

Decree holder.—This term does not include other decree holders who are entitled to rateable distribution under S. 73. 37 B. 387; 31 B. 207; 40 C. 619; 23 M.L.J. 585=17 I.C. 920; 1 C.W.N. 195; 30 C. 262 (*contra* in 12 C.W.N. 500).

Must deposit into Court.—A deposit under the rule must be in cash and not by means of a cheque drawn on a bank. 8 Bur. L.T. 80=27 I.O. 656. Amounts paid by the purchasers in Court-auction whose purchases have not been confirmed and which amounts therefore cannot be withdrawn by the decree-holder at his pleasure cannot be taken advantage of by any person who applies under O. 21, r. 89, 31 I.O. 913. R. 89 is a concession to the judgment-debtor and the judgment-debtor must strictly comply with it. An undertaking to pay a certain amount is not a payment. Hence a part payment coupled with an undertaking to pay the balance cannot be considered as payment or deposit in full within r. 89. 23 Bom. L.R. 847=63 I.O. 39.

Court.—The word "Court" means a Civil Court and not a Revenue officer. 8 Bur. L.T. 80=27 I.O. 656; 44 B. 50; 40 A. 425. A deposit with a ministerial officer of the Court apparently authorised to receive it is sufficient. 7 Bom. L.R. 263.

The deposit made in Court must be unconditional.—When a deposit is made with a condition that a sum may not be drawn out at once but may be retained in Court until a certain event happened, it is not a good deposit. But where a conditional deposit was made which was accepted by Court without any question and as soon as objection was taken by the decree-holder, before he had made any attempt to withdraw the money from Court, the condition was withdrawn *held*, that the deposit was valid and sufficient for reversal of sale. 15 C.L.J. 83=16 C.W.N. 904=10 I.C. 880. A payment to set aside auction sale by a person claiming to be the owner of the property sold cannot recover the amount from the decree-holder after the sale is set aside, on the ground that the judgment-debtor had no interest in the property. 45 B. 1094.

Deposits made by several persons.—When property is sold in several lots a person desiring to set aside a sale under one lot cannot take advantage of the amounts deposited by the purchasers of other lots, and he should deposit the whole amount. 1 C.W.N. 709. A judgment-debtor is not entitled to take advantage of any deposit made by his co-judgment-debtor independently. 14 L.W. 631; 42 M.L.J. 71=65 I.C. 983. A judgment-debtor applying to set aside a sale under O. 21, r. 89, C. P. Code need not deposit the entire amount mentioned in the sale proclamation but can take advantage of the sums deposited by the other judgment-debtors provided that the entire amount mentioned therein is fully made up and the decree-holder is in a position to draw the full amount from Court. 22 I.C. 53.

There must be a satisfaction of the decree to the extent of the purchase money.—Payments by persons who are not only strangers to the decree but persons who do not come at all under the description given in O. 21, r. 89, cannot have the effect of satisfying the decree in the eye of law, unless and until the decree-holder consented to receive the amount deposited in satisfaction of the decree. 34 I.C. 350=(1916) 1 M. W.N. 145.

Less any amount which may have been received by the decree holder.—It means an actual receipt. A mere payment into Court of the sale proceeds does not satisfy the requirements of this rule. 23 B. 723; 26 M.L.J. 262; 25 Bom. L.R. 446=73 I.C. 454. Actual receipt of the amount in cash is not necessary. An agreement by the decree-holder to set off a portion of the decretal amount against services rendered by the judgment-debtor coupled with a cash payment not covered by the agreement would, if proved, amount to receipt of payment. (1912) M.W.N. 756=14 I.C. 326; see also 24 M.L.J. 205=28 I.C. 575; 12 I.C. 169; 9 M.L.J. 258; 23 M. 37. Payment to the decree-holder need not be in cash. It is not necessary that payment to the decree should be in cash to justify an application. It is enough if the decree-holder is satisfied with regard to the whole amount due to him to justify an application under O. 21, r. 89. 24 M.L.J. 205=18 I.C. 574. Amounts paid by the purchasers whose purchases have not been confirmed and which amounts therefore cannot be withdrawn by the decree-holder at his pleasure cannot be taken advantage of by any person who applies under O. 21 r. 89, 31 I.C. 1913. (28 M.L.J. 262, followed).

Costs.—A fresh vakalatnama or authority to a pleader being unnecessary for the purpose of executing the decree, the costs for vakalatnama are not costs chargeable under S. 174, B.T. Act. The poundage fee paid by the decree-holders in respect of the execution sale at which they purchased cannot be treated as an integral part of the costs incurred by them and the decree-holders are not entitled to claim the money from the judgment-debtors. 16 C.W.N. 736=13 I.C. 365. Any amount of poundage recoverable under the heading of costs from the judgment-debtor comes under sub-ol. (3) and they are not to be deposited under this rule. The remedy of the purchaser in such case is to apply to the Court for recovering what is due to him under this sub-rule. 20 M. 158; 23 B. 450.

RIGHT TO CONTRIBUTION FOR THE DEPOSIT.—A judgment-debtor making a deposit under O. 21, r. 89 is entitled to contribution of the decretal amount from the other judgment-debtors though not of the 5 per cent. deposit or costs of the application. 10 I.C. 458=8 A.L.J. 622; 6 I.C. 810=14 C.W.N. 945 (33 M. 15 not followed).

THERE MUST BE NO APPLICATION UNDER O. 21, R. 90, PENDING IN THE COURT.—11 I.C. 196=17 C.W.N. 476. Otherwise the procedure is irregular and the objection is not maintainable. 21 A.L.J. 340=74 I.C. 557. Where an application purports to be one under r. 90, but is really one under S. 47, the provisions of sub-r. (2) of r. 89 do not apply to the case. 33 B. 698. An applicant under O. 21, r. 89, is not entitled to impugn a sale for irregularity in publishing or conducting it. 28 C. 73. A judgment-debtor whose application under r. 90 is dismissed for default, is not thereby disqualified from subsequently applying for getting back the property under O. 21, r. 89. 20 O.C. 329=43 I.C. 340. O. 21, r. 89 (2) prevents a person who has preferred an application under r. 90 from making or prosecuting or carrying on an application under r. 89, until he withdraws his application under r. 90. 11 I.C. 196=17 C.W.N. 476; 23 C. 958; 5 O.C. 137; 10 O.C. 141; 8 M.L.J. 56. When an application under O. 21, r. 90, is put in by one of the co-owners of ancestral property, an application under this rule by another co-owner is not barred. 30 A. 192. An appeal against an order rejecting an application under r. 89 is not barred by reason of an application under r. 90, having been made by the judgment-debtors other than those who have made the application under r. 89 immediately after the rejection of the latter's application but before appeal. 23 C. 582.

PERIOD FOR APPLICATION AND DEPOSITS.—The application and deposit must be made within thirty days from the date of the sale as provided by Art. 166 of the Indian Limitation Act, 1908 and O. 21, r. 92. 9 A.L.J. 12=13 I.C. 404; 1926 B. 335; 28 I.C. 705; 7 Bom. L.R. 263. A deposit though made after confirmation of sale is good if it is made within 30 days of the sale. 8 Bur. L.T. 80=27 I.C. 656.

Extension of time.—The Court has no power to extend the time fixed, i.e., thirty days. The requirements of O. 21, r. 92 (2) that the deposit should be made within thirty days is not merely directory but mandatory. 29 M.L.T. 192=33 I.C. 996. But according to the Patna High Court, a Court can extend the time with the consent of the parties. 2 Pat.L.J. 169=39 I.C. 669; 1 Pat. L.J. 459=35 I.C. 779. When the decretal amount and the penalty of 5 per cent. were paid a few days after 30 days and all the parties to the sale agreed to the sale being set aside, the Court can set aside the sale under S. 151 of the Code if not under O. 21, r. 89. 9 O. & A.L.R. 983. The High Court has no power to extend the time allowed to the judgment-debtor under O. 21, r. 92 (2) to deposit the decretal amount, etc., with a view to set aside the sale either under S. 5 of the Limitation Act or S. 148 of the O. P. Code. 15 C.W.N. 685=19 C. L.J. 535. The full amount must be paid within 30 days. A mistake in calculating the amount by the officer of the Court would not bring the application within time. 26 C. 449; 18 C. 255. But if the officer was charged by the Court to make the calculation and to inform the parties as to the amount to be deposited, the period is extended. 22 I.C. 942; 18 C. 255; 7 I.C. 52. The judgment-debtor having applied to set aside a sale held in execution of a decree on the last day of limitation tendered the money to the treasury officer shortly before 3 p.m., but he refused to take it because there was not sufficient time to count it and also because it could be paid at any time within three days of tender. The judgment-debtor paid it the next day which was beyond thirty days after sale; *held*, that the judgment-debtor having done all that lay in his power to deposit the money in time and having been prevented by the action of the Treasury officer, who for the purpose was an officer of the Court, should

be taken to have made the payment within the time allowed by law. 37 A. 591. During the pendency of an application by the judgment-debtor to set aside a sale under O. 21, r. 89, the decree-holder-auction-purchaser offered to restore the property on getting the decretal amount within a certain time. The judgment-debtor failed to pay the amount within the time fixed and to apply for extension of the time. *held*, that it was not competent to the Court to extend the time fixed by the parties themselves. 36 I.C. 809.

When there is no fault of the depositor.—When the actual delay in the deposit of the money was not due to any act on the part of the judgment-debtor and the deposit was actually made after 30 days, the Court is justified in accepting the payment as within time. 17 A.L.J. 991=52 I.C. 161. A petitioner is not prejudiced by his failure to make an application accompanying the deposit under O. 21, r. 89, by an Act of Court. A fresh presentation of the application and the deposit of the money on the following day will be sufficient compliance with the provisions of law. 16 C.W.N. 904=10 I.C. 880; 22 M. 286; 13 C.L.J. 467; 10 I.C. 51. When on the last day for making the deposit it could not be made on account of the presiding officer leaving earlier than usual, a deposit made on the next day is in time and valid. 10 I.C. 880; 6 O.C. 68. The mistake of an officer of the Court in calculating the sum to be deposited cannot avail the judgment-debtor unless he can show that the mistake was made by an officer whose duty it was to give the information. 26 C. 449 F.B.; 6 C.W.N. 57; 13 C.W.N. 591; 30 M. 507; 29 C. 626; 25 C. 609; 7 I.C. 52. When the period of thirty days ends in holidays, the deposit may be made on the date when the Court opens next. 9 O.C. 214.

Minority.—Minority does not save limitation under O. 21, r. 89. 1 I.C. 178=6 N.L.R. 1.

When the period begins.—A sale of immoveable property in execution of a decree is not complete until the officer conducting the sale has accepted the final bid and the purchaser has paid the deposit required by O. 21, r. 84. The *terminus a qua* for the period of 30 days provided by O. 21, r. 92 (2) must therefore be deemed to be the date of the deposit. 17 I.C. 733; 50 I.C. 914. If for any reason the final bid remains unaccepted for some days by the sale officer the period of 30 days does not begin until such bid is accepted by him. 35 A. 65.

Date of the sale.—The date of the sale means the date on which the property is actually put up for sale and knocked down to the highest bidder. An application for setting aside a sale made within 30 days after the order of the first appellate Court reversing an order setting aside a sale or of the second appellate Court confirming such order of the first appellate Court is not within time. 29 C. 626; 26 C. 449. Date of sale is the date when the sale actually takes place and not the date of the confirmation of sale, or when the order setting aside the sale is made. 6 C.W.N. 776.

THE APPLICATION MUST BE TO SET ASIDE SALE OF THE WHOLE PROPERTY.—Where property is sold by separate lots in execution of a decree it is not open to the judgment-debtor to apply under this rule to set aside the sale of some only of the lots. The application must be to set aside the sale of all the lots. 1 C.W.N. 703.

NECESSARY PARTIES.—O. 21, r. 92 does not lay down that the auction-purchaser must be a party. It provides for an issue of a notice to him. The duty of moving the Court to issue the notice lies on the applicant and all the Court can do is to give him reasonable opportunity to do so. On default the Court may dismiss the application, and there is no obligation on the Court to issue the notice of its own

motion without his assistance. 75 I.C. 490=4 Pat. L.T. 491. When the purchaser is not made a party though his purchase is mentioned in the body of the petition, it is a sufficient compliance with the rule. Notice can be issued to him as one of the parties affected by the sale and it is not necessary that he should be formally added as a party. 1923 C. 994. There is no provision in the law that the auction-purchaser must be made a party in an application to set aside the sale. It is enough that the auction-purchaser should be mentioned by name. 82 I.C. 776.

NOTICE.—A sale should not be set aside unless a notice is served on the auction-purchaser and an opportunity is offered to him to contest the validity of the application. 5 I.C. 305=11 C.L.J. 86; 1 C.W.N. 114; 23 C. 993. If there is no notice, the proceedings will be bad. 5 C.W.N. 63.

A SALE MAY BE SET ASIDE EVEN AFTER IT IS CONFIRMED UNDER O. 21, R. 92. 31 B. 207.

WITHDRAWAL OF AMOUNT AND ESTOPPEL.—When the previous purchaser of a holding applied to set aside the sale and the amount deposited by him was withdrawn by the landlord decree-holder, the latter was estopped from opposing the setting aside of the sale or from questioning the purchase. 9 I.C. 619.

RECOVERY OF AMOUNT DEPOSITED UNDER O. 21, R. 89.—The depositor is not entitled to recover money from the decree-holder as the former was not bound to pay the money under Ss. 69 or 70 of the Indian Contract Act. 12 C.W.N. 151; 30 A. 167; 7 O. C. 146. The mortgagee decree-holder in paying the amount under O. 21, r. 89 to set aside a sale in execution of a rent decree does not make a payment within the meaning of S. 69 but under S. 70 of the Contract Act. 16 C.L.J. 156=13 I.C. 144. A suit does not lie by an under-tenant of a non-agricultural land to recover from the tenant, his lessor, money which had been paid by him under O. 21, r. 89, to set aside the sale of his lessor's interest under a decree passed against the latter. 6 C.W.N. 336. When a sale is set aside on deposit of money by a stranger for the judgment-debtor on the agreement that the property will be sold to the former on the sale being set aside, and the sale is thereafter set aside, but on the sale being confirmed by the appellate Court, the stranger was entitled to withhold the money, it could not be attached as belonging to the judgment-debtor. 13 C.W.N. 100=4 I.C. 327.

AMOUNT DUE TO THE DECREE-HOLDER ON THE SALE BEING SET ASIDE.—Upon a sale being set aside under O. 21, r. 89, the decree-holder is only entitled to what was due to him under the decree on the date of payment into Court by the auction-purchaser. 7 Bur. L.T. 68=24 I.C. 479.

APPLICATION TO SET ASIDE SALE ON THE GROUND OF IRREGULARITY OR FRAUD.—(1) Where any immovable property has been sold in execution of a decree, the decree-holder or any person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity, or fraud in publishing or conducting it: provided that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved, the Court is satisfied that the applicant has sustained substantial

injury by reason of such irregularity or fraud. (O. 21, r. 90.)

LEGAL CHANGES.—(1) The new Code has altered the law in an important respect inasmuch as an application based on fraud in publishing or conducting a sale comes within the provision of O. 21, r. 90 and not under S. 47, as under the old Code, 40 A. 122; 4 L. 243; 16 I.C. 690=22 O.L.J. 266; 26 I.O. 369=(1914) M.W.N. 92; see 4 C.W.N. 538; 24 A. 239; 27 A. 702; 2 C.W.N. 691; 26 C. 326; 26 C. 324; 26 O. 539, old law. (2) No second appeal lies from an order under O. 21, r. 89, 90 or 91. 9 I.O. 399. Under the old Code such an appeal was allowed. 15 C.W.N. 648 P.C.=11 I.C. 399. When the order of the first Court setting aside the sale on the ground of fraud was made when the Code of 1908 had come into force, the order should be treated as one under O. 21, r. 92 (1), and the application though made under the old Code must be treated as one under O. 21, r. 90 and hence no second appeal was competent. 8 I.O. 3. As the case was fraud was not included in the corresponding section of the old Code it came under S. 244 of the old Code (corresponding to S. 47 of the new Code) and a second appeal lay. 9 I.C. 135. Under the present Code no second appeal lies even in such cases. 40 A. 122; 15 I.C. 679=16 C.W.N. 1015; 9 I.O. 135; 30 M.L.J. 611. The effect of the change in law is that while under the old Code, in cases of fraud, no question of substantial injury arose, under the present Code it is necessary. Under the old Code the period of limitation for an application based on the ground of fraud was three years under Art. 178 of the Limitation Act. 26 C. 324; 30 C. 142; 2 C.W.N. 691. But under the present Code the period for such an application is 30 days.

SCOPE.—On an application under O. 21, r. 90, the Courts have no jurisdiction to set aside the sale except on the ground of material irregularity in conducting or publishing the sale or fraud and of injury sustained by the judgment-debtor in consequence. There is nothing in rule 90, which allows a Court to go into any question over and above these grounds. 21 A. 140; 18 A. 141; 6 O.C. 61; 9 I.O. 252=9 M.L.T. 260; 222 P.L.R. 1911. An application under O. 21, r. 90 to set aside an execution sale is limited to the grounds set forth in that rule. Such a sale cannot be set aside upon grounds not pleaded by the applicant. 102 P.L.R. 1911; 21 A. 140.

O. 21, r. 90, deals only with irregularity and fraud in publishing and conducting a sale and a sale by the Court of property which is not in fact saleable on the ground of non-transferability is not a material irregularity in conducting the sale. (1920) Pat. 221=57 I.C. 261; 7 A. 641. Though judicial sales should not be allowed to be challenged on technical grounds still it is not fair that a decree-holder should be allowed to get the properties for a low price by unfair means. 14 C.L.J. 541=13 I.C. 397. An order setting aside a sale to which the applicant is entitled under O. 21, r. 90, is entirely different from a declaration that the sale is null and void *ab initio*. 18 A. 141; 28 A. 273. An objection that the property is not saleable is not entertainable under O. 21, r. 90. 7 A. 641. When a sale takes place in several lots a sale of any lot may be set aside under this rule. 9 M.L.T. 250. When property is not worth more than the decretal amount the fact that the decree-holder is willing to treat the sale as one for a value which would enable the judgment-debtor to say that in fact the debt had been paid off in full is no answer to a judgment-debtor's application to set aside the sale for substantial injury caused by the irregularities. 16 C.W.N. 1022=15 I.C. 728. Where owing to certain irregularities in the procedure and owing to the insufficiency of the notice and lack of advertisement of sale, the property was knocked down to the decree-holder for an inadequate price, the proper course is to set aside the sale and not to drive the judgment-debtor to a fresh suit against his guardian *ad litem* and the decree-holder. 144 P.L.R. 1914=25 I.O. 51. An objection that a sale of property in execution of a decree should be set aside, on the ground that the property was not liable

to attachment is one that cannot be entertained under r. 90, as the objector was not a party to the decree. Such an objection ought to be taken at the time of attachment. 7 A. 365; 19 B. 276. When there is an irregularity in proclamation of sale, the judgment-debtors are not bound to realise the difference from the defaulting purchaser and the sale may be set aside when there is substantial injury. 9 C. 98.

O. 21, r. 90, not only covers a case of material irregularity, but also a case of fraud in publishing or conducting the sale. 66 I.C. 220.

Sale of several properties.—A Court can set aside a sale as regards some of the properties put up at one auction and without setting aside the sale of the others. 24 I.C. 64—18 C.W.N. 947; 9 C. 656.

Dismissal of execution application and setting aside sale.—Dismissal for non-prosecution of a decree-holder's application for execution does not disentitle him to make an application under O. 21, r. 90 to set aside a sale on the ground of fraud, etc. 24 I.C. 83—18 C.W.N. 1311.

APPLICABILITY.—The provisions of O. 21, r. 90, apply to sales made by receivers appointed by the Court. 6 Bom.L.R. 1140.

Proceedings before Collector.—By Rule XII of Rules made by the Local Government under S. 320 of the old Code in the notification No. 671 of 1880 dated 30-8-1880, it was intended that Collectors should apply the procedure and practice provided by these rules in cases of applications by judgment-debtors whose immovable property has been sold for setting aside sales. A.W.N. (1882) 61. These rules do not apply to a certificate under Bengal Act, VII of 1880, as they only relate to sale in execution of decrees and not to proceedings instituted after the sale. 14 C. 1.

Public Demands Recovery Act.—This rule does not apply to execution proceedings held under the Public Demands Recovery Act, I of 1895. 33 C. 451.

O. 21, r. 90, applies to sales under the T.P. Act. 30 A. 146.

O. 21, r. 90, has no application to a contract of sale entered into by a receiver under the Provincial Insolvency Act. The Insolvency Court can interfere with such a contract only under S. 22 of the Act on an application made within 21 days of the contract. 7 L.W. 406—44 I.C. 885.

APPLICATION.—There must be an application to set aside the sale, to the Court under O. 21, r. 90; otherwise the Court is not competent to set aside the sale under the rule. A.W.N. (1882) 1. The application under this rule must be to set aside the entire sale, except in cases where properties are sold in lots, in which cases the sale of each lot is a separate sale, though all the properties are covered by one proclamation and one person has purchased all the lots. 1926 C. 829.

Application under O. 21, R. 90 and S. 174, B.T. Act.—If a judgment-debtor has made an application under O. 21, r. 90 he is competent to apply under S. 174, B.T. Act, if he withdraws his former application. 1 I.C. 304—13 C.W.N. 591. On an application under O. 21, r. 90 to set aside an execution sale, such a sale cannot be set aside upon grounds not pleaded by the applicant. 21 A. 140; 102 P.L.R. 1911—9 I.C. 816. But the applicant can by way of additional particulars point out by a further application after the period of 30 days that certain heavy encumbrances which did not exist had been notified in the proclamation. 1926 A. 305—92 I.C. 567.

Restoration of the application.—O. 9, r. 9, applies to an application made under O. 21, r. 90 for setting aside an execution sale. 20 C.W.N. 1203—33 I.C. 581; 23 O.C. 343—59 I.C. 575. An application for setting aside a sale is not an application for

execution, but of the nature of an original proceeding which is not excluded from the purview of S. 141, C. P. Code. Such an application if dismissed for default can be restored under O. 9, r. 9, especially in a case when the remedy by review or by way of a regular suit is not open to the applicant. S. 151, C.P. Code, does not give the Courts of a power of review which is expressly prohibited by S. 47, C. P. Code. 19 O.W.N. 758 = 29 I.C. 395. (A contrary view was taken in 52 I.C. 416, 83 I.C. 749, 62 I.C. 119 = 2 Pat. L.T. 270). But the Court was held to have inherent power in such cases to restore the application to the file and decide it on the merits. See also 68 I.C. 643. When an application for restoration is dismissed it was doubted in 28 O. 622, if another application could be brought. An order rejecting an application of the judgment-debtor for restoration of the application dismissed for default is not appealable. 56 I.C. 981 ; 31 O. 207 ; 27 C. 414 ; 1 Loh. Cas. 49 ; 89 I.C. 360 ; 80 I.C. 678 (*Contra* held in 20 C.W.N. 1203 = 33 I.C. 581 ; 79 I.C. 351 ; 80 I.C. 678.)

WHO CAN APPLY UNDER O. 21, R. 90.—The decree-holder can apply under the rule. 1 Bur. L.J. 234. The original holder of the attached decree remains the decree-holder notwithstanding the attachment of his rights and can apply. 21 M. 417. Any person entitled to share in a rateable distribution of assets has a right to apply. 27 M.L.J. 302 = 15 A. 318 ; 26 I.C. 93 ; 21 M. 51 ; 15 A. 318 ; 10 M. 57 ; 1 Bur. L.J. 234 ; 24 M. 311 ; 29 L. 548 (*Contra* in 4 O.W.N. 542, no longer law). The decisions under the old Code were conflicting. 20 O. 673. This expression refers to rateable distribution under S. 73, C.P. Code and not to distribution of dividend under the Provincial Insolvency Act. 10 S.L.R. 189 = 39 I.C. 932. An application, by a person entitled to rateable distribution to set aside a sale lies under O. 21, r. 90. 24 I.C. 83 = 18 C. W.N. 1311. A person who is not entitled to a rateable distribution as where the application for execution is not made until after the receipt of sale proceeds by the Court cannot apply under this rule as a person whose interests are affected by the sale. 27 M.L.J. 302 = 26 I.C. 93. A person whose application for execution is dismissed for default can apply, as he is entitled to rateable distribution. 24 I.C. 83 = 18 C.W. N. 1311.

Any person whose interests are affected by the sale can apply.—These words refer to existing interest in the property sold and not the claims of alleged creditors. 10 S.L.R. 59 = 35 I.C. 530. These words are new in the present Code and substituted for the words "any person whose immoveable property has been sold" and widen the scope of the section and give effect to the rulings of the Bombay and Calcutta High Courts in 12 O. 488 F.B., 23 B. 450, 27 M.L.J. 302, 87 I.C. 94. (See also 51 C. 495) It cannot be said of a person that his interests are affected by the sale, unless his title to the property or any part thereof is affected by the sale. 15 O. 488.

Purchasers of immoveable property from the judgment-debtor before attachment cannot apply under this rule. 15 O. 488 F. B.; 16 M. 476 ; 20 O. 418 ; 23 B. 450 ; 21 M. 416 (14 O. 240, overruled) (*Contra* in 12 A. 490 F.B.). A person who claims to be the purchaser of a tenure prior to attachment from the judgment-debtor whose interest in the tenure has been sold for its own arrears of rent is entitled to apply, for his interests are certainly affected by the sale. 22 O. 802. A prior private purchaser from a tenant can apply under the rule to set aside a sale in execution of a rent decree in favour of the landlord. 10 O. 496. A person who claimed to be the owner of the property sold in execution as a purchaser under a private sale is not competent to object. A.W.N. (1883) 7. A purchaser of property under a sale subsequent to the mortgage upon which a decree was passed and a sale took place cannot apply under r. 90. 2 W.R. Mis. 13 ; 15 O. 488 F.B. ; 20 O. 418 ; 11 B.H.C. 15. A decree-holder-purchaser cannot object that the judgment-debtor has no interest in the property sold and hence cannot apply under r. 90 ; the fact that he purchased the property is a proof of the fact that he recognised the right of the judgment-debtor in

the property. 6 W.R. Mis. 31. A person who has purchased the property at a prior execution sale when such sale, has not been confirmed, cannot apply under the rule. 8 C. 367. A transferee of a portion of a non-transferable occupancy holding is entitled to apply to set aside a sale held in execution of a decree for arrears of rent in favour of the entire body of landlords. 23 I.C. 839=19 O.W.N. 326; 87 I.O. 381; 86 I.O. 612. The presumptive heir of a transferee of property is not entitled to apply. 86 I.C. 575= (1925) Pat. 556.

Beneficial owner.—When immoveable property has been sold in execution of a decree against the ostensible owner as his property, a person claiming to be the beneficial owner can apply. 20 O. 418; 19 M. 167. Unless his right to the property is in dispute and a suit by him for a declaration of his rights is still pending at the date of the application. 34 I.C. 272=14 A.L.J. 409.

A purchaser at a Court sale cannot apply because his title to the property is not affected, if he seeks to set aside the sale on the ground that he was induced to pay by fraud a larger price for the property. 20 C. 8 P.C.; 68 I.C. 629; 47 A. 479 (*contra* held in 55 I.C. 333=38 M.L.J. 228 and 65 I.C. 875=18 N.L.R. 98, where it was held that such a purchaser can apply under this rule). An auction-purchaser cannot apply to have the sale set aside under O. 21, r. 90, as he is not a person whose interest was affected by the very sale sought to be set aside. 74 I.C. 760; 68 I.C. 429. A purchaser at an execution sale is a person whose interests are affected by the sale under O. 21, r. 90. 38 M.L.J. 228=55 I.O. 333; 65 I.C. 875=18 N.L.R. 98. A purchaser of a tenure prior to attachment from a judgment-debtor whose interest in the tenure has been sold in execution of a decree for its own arrears of rent has a right. 22 C. 802.

A co-sharer cannot apply under this rule for his share does not pass under the sale. 5 A. 42; 5 A.L.J. 252. The one-seventh co-sharer landlord was held competent to apply under O. 21, r. 90, when the five-sixths co-sharer got a decree against the tenants of a tenure for the arrears of rent due in respect thereof and in execution of that decree in the proceedings taken under the B.T. Act, they brought the tenure to sale; also the one seventh co-sharer had a rent decree against the same tenant but which decree was time-barred. 23 C.W.N. 619=50 I.C. 329. A person, who has obtained attachment before judgment, cannot apply because such an attachment creates no interest in the property attached. 17 C.W.N. 80=15 I.C. 668; 21 C.L.J. 614=30 I.C. 38; 42 C.L.J. 37.

An attaching creditor is not a person whose immoveable property has been sold. 4 C.W.N. 542; but see now 51 C. 495. An attaching creditor can apply under the rule 51 O. 495; 89 I.C. 688=1925 C. 1103.

A reversioner to a Hindu widow estate's can apply under this rule. (1919) Pat. 303=51 I.C. 359. Where in execution of a decree against some members of a joint Hindu family, property of the family is sold, it is open to any other member of the family, having an interest in the property and not being bound by the decree to institute a suit to set aside the sale and recover possession of the property without applying to set aside the sale under O. 21, r. 90. 2 P. 386=1923 P. 451. When land covered by a simple mortgage is sold in execution of a rent decree and purchased by the landlord himself, an application under O. 21, r. 90, will lie by the mortgagee to set aside the sale. 1 C.L.J. 454; 5 C.W.N. 831 F.B.

Members of a joint family.—When during the pendency of a partition suit, the property was sold in execution of a decree against one member of a joint family as belonging to him, the other members cannot apply under this rule to have the sale set aside. 1926 N. 68=91 I.C. 218.

Judgment-debtor.—A judgment-debtor who has been adjudged an insolvent and whose property has been vested in an Official Receiver has no interest to apply under

O. 21, r. 90. to set aside the sale. 10 S.L.R. 53—35 I.C. 530 ; It is wrong to hold that the judgment-debtor could not be permitted to take objections founded on the contents of the sale proclamation, because he might have objected to them before the sale and did not do so. 4 O.C. 379 (B). A judgment-debtor whose right in the property in dispute was sold under a previous execution and purchased by the decree-holder himself, is in a position to contest the sale. 6 W.R. 31 Mis. ; 22 L.W. 872. A judgment-debtor who is not the owner of the property covered by a hypothecation decree and sold in execution thereof, cannot apply under O. 21, r. 90. 2 Mys. L.J. 100. An application by a co-judgment-debtor to set aside a sale is maintainable even though a similar application by another judgment-debtor has proved infructuous. 1926 C. 829 ; see also 16 C.L.J. 98. An application by the judgment-debtor whose interest in the property ceased prior to sale in execution is maintainable under O. 21, r. 90. 1926 M. 217—92 I.C. 597. A judgment-debtor who has sold his interest after the execution sale is competent to apply under this rule. 1926 C. 56—87 I.C. 94.

Guardian.—An application by a mother of a minor as his guardian, the sale being effected without his representation is entertainable under O. 21, r. 90, for setting aside a sale. 29 I.C. 211.

A stranger is not entitled to come in under this rule to apply. A.W.N. (1883) 7 ; 25 W.R. 79. A person claiming adversely to the title of the judgment-debtor, the property sold in execution cannot apply under the rule to have the sale set aside. 1 Bur. L.J. 234. A person in possession of property before the grant of a certificate of sale who continues in possession after the sale has vested the title in another is not entitled to apply. 3 P. 458.

A mortgagee of land sold in execution of a rent decree and purchased by the landlord, can apply to have the sale set aside. 1 C.L.J. 454 ; 5 C.W.N. 821 F.B. A person who alleges that his property has been sold in execution of a mortgage decree passed on foot of a mortgage which had been executed by him has no *locus standi* to apply under O. 21, r. 90, to have the sale set aside, he having already brought a suit for a declaration of his title to the property mortgaged. 88 A. 358. A person not a party to a mortgage decree has no *locus standi* to object to irregularity of sale and that the property sold was not the property mortgaged in respect of which the decree has been obtained. It is open to him to assert title in a separate suit. 20 I.C. 16. A mortgagee of an entire non-transferable occupancy holding who has purchased the holding in the execution of his mortgage decree is a person whose interests are affected by the sale of the holding in execution of a rent decree and as such has a *locus standi* to apply under the rule to set aside the sale. 22 C.W.N. 143—31 I.C. 859. Persons who had no interest in the property at the time the mortgage decree was passed by reason of the fact that they were then unborn and the property was not ancestral, cannot apply to set aside the sale in execution. 23 I.C. 402.

Mortgagors and mortgagees.—A decree under S. 88, T.P. Act, has virtually the effect of declaring the mortgagee's right to the property subject to the liability to transfer it to the mortgagor on payment of the sum found due within a certain date. If payment is not made on or before the date fixed, the mortgagor is absolutely debarred of all rights not to the property, but to redeem the property. Therefore either the mortgagor or the mortgagee, under such circumstances, would be entitled to apply under O. 21, r. 90, 13 C. 346 ; 23 B. 450 ; 29 C. 1 F.B. ;

Persons having an interest in dividends under the Provincial Insolvency Act are not persons whose interests are affected by the sale and hence cannot apply under O. 21, r. 90. 39 I.C. 932—10 S.L.R. 189.

The Liquidator of a company of limited liability differs from the Official Assignee in this that the property of the company does not vest in him and the attachment and sale could not be set aside at the instance of the liquidator. 43 O. 586.

A purchaser of a part of a non-transferable occupancy holding has a right to apply under O. 21, r. 90, for reversal of a sale in execution of a decree for arrears of rent obtained by the entire body of landlords. 23 I.C. 839 = 19 O.W.N. 326.

THERE MUST BE MATERIAL IRREGULARITY OR FRAUD IN PUBLISHING OR CONDUCTING THE SALE.—There must be a material irregularity to render a sale liable to be set aside. It must be shown that the omission was a material one. It is not for every omission that a sale is liable to be set aside. 53 I.C. 143. The fact that an auction sale was made at a price considerably below the value of the property or that few persons attended the sale as bidders, alone, cannot be sufficient to set aside a sale unless there has been an irregularity in publishing or conducting the sale. 5 N.W.P. 19; 19 W.R. 227; 25 W.R. 326. The sale is not liable to be set aside unless there is a material irregularity in publishing or conducting the sale. 12 I.C. 572 = 222 P.L.R. 1911; 85 I.C. 342 = 1925 M. 202; 78 I.C. 609 = (1925) M.W.N. 887.

PROOF OF IRREGULARITY OR FRAUD.—Burden of proof.—When a judgment-debtor wants to set aside a sale on the ground of irregularity the onus of proving the irregularity is on him. 2 W.R. 74; 5 W.R. P.C. 7 = 9 M.I.A. 324. The onus of proving fraud lies on the person coming forward to set aside a sale. 24 W.R. 388. The Court ought not to decide upon the report of the Court-officials and to refuse to allow the judgment-debtor to adduce evidence to the contrary when an issue arises as to the irregularity. 7 O. 34. It must be presumed that the sale was a legal sale and any one who seeks to set it aside must establish that it is open to objection. A.W.N. (1887) 17. The burden of proving irregularity as well as substantial injury lies on the applicant. 2 W.R. Muz. 1. When there is no allegation of the applicant that he suffered any damages on account of the irregularity, the sale cannot be set aside. 10 M.L.J. 205.

FRAUD.—S. 311 of the old Code of 1882 applied only to irregularity and made no provision for the case of fraud and a second appeal was held to lie where a sale was sought to be set aside on the ground of fraud, the reason being that, as "fraud" was not included within the old corresponding section, the case of fraud was attached to the general provisions of S. 244 (corresponding to S. 47 of the present Code) in which case there was a second appeal. 31 O. 385; 3 C.W.N. 399; 26 O. 539; 19 O. 683; 25 B. 418; 12 O.W.N. 136; 6 O.W.N. 283; 32 B. 572; 10 Bom. L.R. 752. But r. 90 of O. 21 of the present Code includes the case of "fraud" as well, and the result of the change in the law is to place the procedure in the case of setting aside of sale on the same footing, whether the application is based on the ground of irregularity or fraud. 9 I.C. 136. Fraud is essentially different from irregularity in the conduct of the sale. (1925) Pat. 521 = 85 I.C. 622.

IRREGULARITY.—The word irregularity in the present rule means not being in conformity to some one of the rules prescribed by the Code regulating sales in execution of decrees. 5 M.L.J. 70. Want of jurisdiction is an irregularity and it is not an irregularity under O. 21, r. 90. 26 M.L.J. 275. Such an irregularity vitiates the sale. 25 B. 337.

IRREGULARITY IN PUBLISHING OR CONDUCTING THE SALE.—The irregularity mentioned in this rule must be one relating to publishing or conducting the sale. 6 M. 237. B.L.R. (F.B.) 545. The fact that the application for execution was

time barred cannot be raised as an objection under this rule. 19 I.O. 377; 6 M. 237; 8 O. 51. A sale held in contravention of the terms of a decree, though irregular cannot be objected to under this rule. 33 I.O. 692 = (1916) 1 M.W.N. 256; 26 I.C. 46 = 27 M.L.J. 605. The objection as to non-saleability of property cannot be taken under this rule. 7 A. 641. An objection that the decree was obtained without summons to the defendant or by fraud cannot be raised under this rule. 29 O. 686; 29 O. 395. An objection that the legal representative has not obtained anything from the deceased judgment-debtor does not fall under this rule. 6 W.R. Mis. 116. An objection that the decree was already satisfied is not under this rule. B.L.R. (F.B.) 945. An objection that the property belongs to the claimant who was not a party to the suit does not fall under this rule. 7 A. 365. An objection that a major was treated as a minor does not fall under this rule. 38 M. 1076. The expression "conducting the sale" in this relates to the action taken by the officer conducting the sale and not anything unconnected with the actual carrying out of the sale. 7 A. 641.

MATERIAL IRREGULARITY.—Omission to specify in the proclamation of sale the extent of the property to be sold or the revenue assessed to it is a material irregularity. 21 M. 51; 23 M. 628. When the property to be sold is wrongly represented in the proclamation of sale as subject to two charges instead of one for a lower amount, the error amounts to an irregularity which would materially affect the price of the property. 8 A. 116. Omission to notify existing encumbrances or the property sold is a material irregularity. 65 I.C. 875 = 18 N.L.R. 98. Omission to specify the amount of income derived from the property or the encumbrances to which the property is subject are material irregularities. 6 C.W.N. 836; 2 C.W.N. 550 P.O.; 7 O. 34. Where the proclamation did not specify the encumbrances to which the property was liable but stated merely the annual profit, income and value of the property sold, and it was sold at a gross under-valuation *held* it amounted to material irregularity. 40 O. 635 P.C. Omission to mention the income of the property is not a material irregularity. 11 P.L.R. 1917 = 39 I.O. 59. Mis-statement of the value of the property or of Government revenue in the proclamation of sale such as is calculated to mislead the intending bidders are material irregularities. 20 A. 412; 9 O. 656; 26 W.R. 44; 38 M. 387; 9 C.L.R. 134. Omission of the Jumma and the name of the decree holder in the proclamation is a material irregularity. N.W.P. (1860) 533. Omission to state revenue assessed upon the property sold is a material irregularity. 45 M.L.J. 403 = 75 I.O. 546 P.O.; 9 C.L.R. 134. A mistake in the sale proclamation as to the judgment-debtor's interest in the property sold does not give any right by itself to the auction-purchaser in the absence of any intentional misrepresentation by or on behalf of the decree-holder. 19 A.L.J. 147 = 61 I.O. 74. When a larger area is advertised for sale owing to a mistake, in the proclamation of sale, than was actually sold, the auction-purchaser can sue either for a refund of a proportionate part of the purchase money or for a cancellation of the sale. He can sue for either of the two reliefs and would be entitled to the first if he can prove that the price paid by him is in excess of the fair value of the property and that he was induced to pay that price by the misdescription in the sale proclamation. 8 Bur. L.T. 169 = 33 I.O. 1003. Where a certain share in a Mauza is attached, but a larger share is sold, the sale is invalid. It is not valid even to the extent of the attached share. 15 I.O. 780 = 16 O.C. 51. The omission to give full particulars of the property, (such as, the Government assessment, its situation, sources of navigation, etc., in respect of agricultural lands; the municipal taxes, locality and distance from business places, etc., in respect of houses in a city), is a material irregularity. 3 Mys. L.J. 159. Attaching or advertising property of two persons for sale under a mortgage, and subsequently announcing that only the interest of one of them will be sold is a material irregularity. 6 O.L.R. 237. Modifying the permission granted to the decree-holder to bid behind his back is a material irregularity. 87 I.O. 997 = 1925 O. 391. The non-

compliance with the provisions of O. 21, rr. 66 to 70 would amount to more than a mere irregularity. 9 A. 511 ; 7 A. 289 ; 10 A. 506 ; 11 A. 393 ; 12 A. 440 ; 18 C. 722 ; 21 C. 140. Misdescription of property in the proclamation of sale is a material irregularity within the meaning of r. 90. 44 I.C. 412=(1918) Pat. 33 ; 50 I.C. 384. Omission to give a sufficient description of the property is a material irregularity. 1 A. 400. Describing a tenure as an ordinary rent paying one and ignoring the fact that it is a service tenure (service attached to a tenure and of a public nature) is a sufficient misdescription to vitiate the sale. 5 C. 389. A description of the property giving only the khasra number without mentioning the gardens and the buildings attached to it is insufficient and a sale conducted is irregular and liable to be set aside. Such a proclamation is calculated to mislead bidders. 47 P.R. 1905 ; 52 P.R. 1909. When the judgment-debtors on whom the notice had been served did not appear on the date fixed for settlement of the terms of the proclamation of sale of several items of property ordered to be sold, *held* that it is not open to them to subsequently raise objection to the sale. 22 I.C. 780. A purchaser of property who accepted the conditions of sale whereby he was required to furnish requisites within ten days after the actual delivery of the abstract of title though he failed to do so, is not precluded from applying to the Court for setting aside the sale, on the ground that the abstract is incorrect and contained a most material misdescription of the document which has been made the root of title. The purchaser is entitled to have his purchase-money refunded. 30 C. 468.

Valuation of the property.—Absence of the valuation of the property, ordered to be sold, from the sale proclamation is not a material irregularity, when it has not a deterrent effect on the minds of the intending or possible bidders. 35 I.C. 411 ; 4 L. L.J. 441=67 I.C. 885=1922 L. 35. Statement of valuation by the decree-holder and the judgment debtor in the proclamation of sale is not an irregularity. 40 I.C. 849. If an understatement of the value of the property to be sold has been made in the sale proclamation which is calculated to mislead bidders and to prevent them from bidding at all and the sale has thus resulted in a price altogether inadequate, such statement must be treated as a material irregularity. 20 A. 412 P.C. ; 13 C.L.J. 192=9 I.C. 698 ; 23 I.C. 946 ; 16 C.L.J. 96=16 I.C. 974 ; 14 C.L.J. 541=13 I.C. 337 ; 15 C.W.N. 713=6 I.C. 180 ; 15 C.W.N. 577=10 I.C. 475 ; 44 I.C. 412=(1918) Pat. 33 ; 25 I.A. 146 ; 11 I.C. 295 ; 32 C. 542 ; 23 M. 563 ; 6 C.W.N. 836 ; 3 O.C. 1 ; 6 C.W.N. 48 ; 8 C.W.N. 257 ; 52 I.C. 23 ; 38 M. 387 ; 6 O.C. 61 ; 83 I.C. 430=28 C.W.N. 552 ; 11 I.C. 438=16 C.W.N. 704. The upset price fixed on the sale proclamation referred only to the annual net income and was not based on the value of the leasehold interest, *held* that it amounted to a material irregularity. 21 I.C. 592. Omission of value of the property in the sale proclamation is a material irregularity. 1922 C. 93. The insertion of any valuation other than the valuation fixed by the Court is calculated to mislead intending bidders, and is therefore wrong. 4 Pat. L.J. 37=49 I.C. 195 ; 73 I.C. 317=(1923) Pat. 208. An under-valuation of property in the proclamation of sale is not a material irregularity within the meaning S. 115, O. P. Code. 29 I.C. 745 ; 12 C.W.N. 757. See 12 C.W.N. 800 ; 33 I.C. 946. To order property which is to be put up for sale in execution of a decree to be valued at twenty times the Government revenue is merely a colourable pretence of making the valuation required by law and such an order cannot be sustained. 3 Pat. L.J. 580=48 I.C. 141.

Amount of the decree.—When a decree has not been wholly satisfied the holding of a sale in execution of that decree mentioning in the sale proclamation an amount larger than the amount due under the decree is only an irregularity. 34 I.C. 350=(1916) 1 M.W.N. 195.

To enter larger amount of the decree in the proclamation.—When a decree has been partially satisfied the holding of a sale in execution of that decree, and

mentioning in the sale proclamation an amount larger than the amount due under the decree, is only an irregularity and does not make a sale a nullity as having been held without jurisdiction. 34 I.C. 350 = (1916) 1 M.W.N. 195.

Rent.—An omission to state the amount of rent payable in respect of a tenure in the sale proclamation of an execution sale is not a material irregularity. 7 O. 723. When a tenure is being sold in execution of a decree for rent any statement in the sale proclamation implying that the auction-purchaser would be liable to pay off antecedent arrears of rent is a material irregularity. 2 Pat. L.T. 248 = 80 I.C. 223.

Non publication of sale proclamation.—Where in publishing a sale proclamation the process-server substituted for the place fixed by the Court in the sale proclamation a different place of sale and thus the sale proclamation as framed by the Court was never published in the village, it was held that the non-publication of the sale proclamation is an illegality which invalidated the proceedings and consequently the sale is a nullity. 39 M.L.J. 188 = 59 I.C. 167. Non-publication of the proclamation of sale is an irregularity which can be waived by the judgment-debtor. It is not an illegality. 91 I.C. 407. An omission to make the proclamation on the spot is a material irregularity. 1 A. 400. The result of proceedings under r. 66 which culminates in a sale proclamation is not conclusive between the parties or binding on the auction-purchaser. 43 A. 489. If the proclamation is not settled by the Court, but by a Commissioner appointed by it, the sale is invalid. 1926 M. 755. An omission to publish the sale proclamation on the properties sold is not an illegality; it is an irregularity which can be waived by the judgment-debtor. 1926 O. 577 = 91 I.C. 407. An omission to state in the proclamation of sale the precise amount of claim received from other decree-holders subsequently to the order directing the sale of the property is not material irregularity. 35 I.C. 411. Omission to give the particulars in the proclamation such as the number, the value, the year, of the loan, the amount of interest due and the rate of interest, etc., is a material irregularity. 8 W.R. 415. The irregular preparation of the actual sale proclamation is a material irregularity. 18 I.C. 715. An omission to give in the proclamation of sale the date and time of the intended sale is an irregularity. 17 O. 769; 51 I.C. 864 = 15 N.L.R. 125.

Charge on the property.—When a property is advertised for sale subject to a charge, but is sold free from the charge, it is a material irregularity. 9 I.C. 383. A sale cannot be set aside, on the ground that in the sale proclamation the property was described as subject to two mortgages, but the fact that the property was not to be redeemed before redeeming other properties of the owner was not described. It is not the business of the attaching creditor to see if there are clauses restraining redemption. He is to proceed under O. 21, r. 66 (3) and then to file an affidavit as prescribed by the Civil Rules of Practice. (1921) M.W.N. 258 = 62 I.C. 735.

Time of sale.—An execution sale held at a time or date other than that proclaimed is not a nullity, but is voidable on proof of material injury. 156 P.L.R. 1915 = 30 I.C. 524; 9 A. 511; 5 O. 259; A.W.N. (1886) 127; 2 N.W.P. 149. When the sale was noticed to take place at noon, but did not actually take place before sunset and in consequence few persons had attended the sale and the price realised was much below its proper value, these facts disclose such material irregularity and substantial injury as were sufficient to warrant the setting aside the sale. A.W.N. (1891) 156. A sale of property two hours earlier than that announced in the notice is an irregularity. 12 W.R. 511; 4 L.B.R. 123; 24 C. 291; U.B.R. (1907), C.P. Code, 9. Selling the property before the time fixed in the proclamation of sale is clearly a material irregularity. 96 P.R. 1885; 8 P.R. 1868; 19 O.W.N. 961 = 27 I.C. 825. It is not an illegality (*ibid*). (*Contra* in 16 O. 794). Publication of proclamation of sale less than 30 days before sale is a material irregularity. 11 O.L.R. 303; 7 O. 34, 39; 78 I.C. 746; 11 A. 393; A.W.N. (1885) 304 (*contra* held that it invalidates the sale, see *infra*). In 4 A. 300 it was held that it is not a material irregularity. An omission to mention the date of sale in the

sale proclamation is a material irregularity. 20 W.R. 240 ; 25 W.R. 328 ; 65 I.C. 746 — 35 C.L.J. 140 ; 1925 C. 201 — 40 C.L.J. 311. When 13th of July was fixed as date of sale in the proclamation and it was notified that in the absence of any order postponing the sale, it would be held at the monthly sale commencing on the 13th of July, but owing to the absence of the Judge, the monthly sale commenced on the 16th July and the sale in question was held on the 20th July in the course of the monthly sale, it was held that there was no material irregularity. 10 M.L.T. 161 P.C. It is an irregularity to delay a sale for several hours. A.W.N. (1887) 129 ; non-compliance with the provisions of O. 21, r. 68, in conducting a sale does not by itself make the sale a nullity. 31 C. 385 ; 21 C. 70 ; 35 C. 61 F.B. (*contra* held in 14 C. 1 ; 5 C.L.J. 687, where it is held that such an irregularity vitiates the sale and is not a mere irregularity). The conduct of the sale before the time mentioned in O. 21, r. 68 is a material irregularity. A.W.N. (1885) 304 ; 11 A. 333. The requirements of O. 21, r. 68, are essential to the validity of the sale and the High Court can under proper circumstances set aside such a sale notwithstanding an appellate order by a Judicial Commissioner confirming such sale. 5 C. 878 F.B. An interval of 30 days is necessary between proclamation and sale when the property is first advertised for sale and not when the sale is postponed for the convenience of the debtor. 1 W.R. Mis. 3. Publication of proclamation of sale less than 30 days before sale is a material irregularity. 11 C.L.R. 303 ; 7 C. 39 ; 14 M. 227. (In 7 A. 289, it was held that it vitiates a sale and is not merely an irregularity under r. 90. See also 14 C. 1 ; 9 A. 511). The sale of immoveable property in execution of a decree, which takes place before the expiry of 30 days, without the consent of judgment-debtor, after the proclamation of sale, is an illegality and amounts to more than irregularity under r. 90, and there is no necessity for the judgment-debtor to prove substantial injury. 11 A. 333 ; 16 I.A. 25 ; 7 C. 34 ; 7 C. 466 ; 11 C. 74 ; 7 C. 730 ; 8 C. 932 ; A.W.N. (1885) 304 ; 9 A. 511 ; 7 A. 289 ; 12 A. 96 ; 12 A. 440 F.B. ; 12 A. 510 F.B. ; 29 A. 196 P.C. ; 5 C.L.J. 687 ; 5 M.L.J. 70 ; 21 A. 140 ; 18 A. 37 ; 21 C. 66 P.C. Where the property advertised for sale at 11 A.M. was sold at 7 A.M., there is something more than an irregularity and the whole proceedings are invalid. 7 A. 676 ; 16 C. 794 ; 25 W.R. 328. If the sale takes place on the day originally fixed after an order of postponement has been passed, it is a material irregularity. N.W.P. (1856) 322. If the sale takes place on any day before the date to which it is postponed, it is an irregularity. 25 W.R. 328. Where the judgment-debtor, by his conduct consented to a sale on a wrong date, he cannot afterwards object to it. 8 C. 932. Holding the sale before the expiry of 30 days from the date on which the copy of the proclamation has been affixed on the Court house of the Judge ordering the sale is a material irregularity. 21 C. 66 ; 48 I.C. 611.

Omission to affix a copy of the sale proclamation as required by r. 67 is such an irregularity. 18 C. 422 ; 48 I.C. 611 ; 7 C. 466 ; P.L.R. (1900) 157. Omission to affix a proclamation of sale on some conspicuous part of the property is a material irregularity. 1923 L. 671. Omission to affix the proclamation of sale at or near the property which was to be sold before affixing it in the Court house is an irregularity. 5 M.L.J. 70. The irregularity of fixing up of the notice of the intended execution sale of one patti of a mahal at the chaupal of a different patti of the same Mahal was not considered as material. A.W.N. (1881) 166. Omission to have a drum beaten as required by r. 67 is a material irregularity. 10 B. 504. A drum need not be beaten at the time of sale. 56 I.C. 523. Omission to have a sale tom-tommed is a material irregularity. 20 M. 159. Where the paucity of bidders at an execution sale was due to the omission of the decree-holder to announce it by beat of drum near the place where the property was situate, the sale must be set aside. 67 I.C. 752. Where the property consisted of 109 mauzas and the proclamation of sale was read out without beat of drum in only one of the mauzas, and affixed to a tree in that village, it is a material irregularity. 40 C. 635 P.C.

Sale on a holiday.—Holding a sale on a holiday is an illegality and it may be set aside. A day is a holiday on which the Court is closed by order of the High Court, 3 W.R. Mis. 24 (*contra* in 3 A. 393; A.W.N. (1882) 169; it is neither an illegality nor an irregularity under O. 21, r. 90). Sale on a holiday is no material irregularity. 3 A. 393; A.W.N. (1882) 169. An execution sale held at a time or date other than that proclaimed is not a nullity, but is voidable on proof of material injury. 156 P.L.R. 1915=30 I.C. 524; 21 O. 66. Omission to specify the hour of sale or the adjournment of sale is a material irregularity. 31 O. 815; 24 C. 291; 6 O.W.N. 48; 20 M. 159; 6 O.W.N. 44; 9 Bom. L.R. 651 P.C. When a sale in execution of a decree was held neither on the day advertised nor on the day to which it had been adjourned, but on some third day, it was a material irregularity in the conduct of the sale. 35 O.L.J. 140=65 I.C. 746; 6 C.W.N. 44. Non specification of the hour to which a sale is adjourned under O. 21, r. 69 is a material irregularity, in publishing the sale. 24 O. 291; 6 O.W.N. 48. Omission to specify the time of sale under O. 21, r. 69 (2) is a material irregularity. 51 I.C. 864=15 N.L.R. 125; 18 O.C. 1=28 I.C. 184. Omission to follow the provisions of O. 21, r. 69 with respect to proclamation is a ground for setting aside the sale. 40 O.L.J. 311=84 I.C. 700.

Omission to issue a fresh proclamation.—When a sale is adjourned more than seven days unless the proclamation has been waived is a material irregularity. 3 O. 542; 24 M. 311; 37 C. 897; 75 I.C. 343=2 Bur. L. J. 54; 18 O. 496; 96 P.L.R. 1902; 25 I.C. 71; 12 A. 510; 11 C. 658; 6 W.R. Mis. 84; 25 W.R. 34; 22 W.R. 481; 23 W.R. 256; 3 W.R. Mis. 11; 17 W.R. 339; 13 W.R. 209; 25 W.R. 328; 3 C. 542; 7 C. 34. When a proclamation of sale was issued and subsequently one of the judgment-debtors got an order of stay of sale by an Appellate Court so far as he was concerned and the sale took place without any fresh proclamation, it was held to be an irregularity. 6 O.L.R. 237. When there is a series of short postponements less than seven days each, which taken together in the aggregate amount to more than seven days, a fresh proclamation of sale is necessary and the omission to do so is a material irregularity. 6 O.W.N. 44. Omission to issue a fresh proclamation of sale when at the instance of the judgment-debtor an execution sale is adjourned to the following month, the judgment-debtor consenting not to raise any objection to any irregularity affecting the sale, is not an irregularity. 23 W.R. 256; 25 W.R. 34; 2 O.L.J. 584; 11 O.W.N. 848; See 11 I.C. 438; 6 W.R. Mis. 84. Omission to issue a fresh proclamation of sale on a release of a portion of the property from attachment is a material irregularity. 3 O. 544; 3 O. 542. Just before the sale of certain items of property in execution of a decree on mortgage of the properties belonging to a joint Hindu family, one of the defendants paid a sum of money and got half his interest in those items released from sale. The remaining half was put up for auction without a fresh proclamation. Prior to the mortgage suit some of the members of the family had become divided and the fact was known to the decree-holder the judgment-debtor and the auction purchaser. *Held*, that there was no irregularity in the conduct of the sale. 11 L.W. 477. An adjournment of a Court-sale by bailiff without leave of Court is a mere irregularity. 20 I.C. 192=6 Bur. L.T. 65. Where two successive applications made by the decree-holders for execution are practically applications to continue the previous execution proceedings, the issue of a fresh proclamation is not absolutely necessary and if necessary it is an irregularity under O. 21, r. 90, C. P. Code. 65 I.C. 988=24 O.C. 391. Default in payment of the deposit of 25 per cent. as required by r. 84 is a material irregularity. 28 A. 238; 16 O. 33; 3 Pat. L.W. 357=41 I.C. 68. A sale wherein the purchaser fails to deposit the balance of purchase-money under O. 21, r. 85 is a nullity and not merely an irregular sale. 15 C.W.N. 350=9 I.C. 916; 9 I.C. 66. Receipt of purchase-money after the 15th day of sale is an irregularity. 6 W.R. Mis. 82.

Legal representative on the record.—Omission on the part of the plaintiff to have a guardian *ad litem* appointed of a defendant where after decree but before sale the defendant had been adjudged to be of unsound mind is material irregularity. 19 M. 219; 22 M. 119; 18 O.W.N. 1319. The omission to bring in the representative of the deceased judgment-debtor on the record does not vitiate the sale. Such an omission amounts to an irregularity. 23 O. 686; 21 O. 866; 3 O.O. 142; 7 O.O. 234; 11 O.O. 159; 30 A. 192 (*contra* in 15 M. 399; 12 A. 440); 19 M. 219. It is invalid 22 M. 119; 19 B. 276; 21 B. 424; 19 I.C. 129; 1924 M. 130. It is not a material irregularity, 1 O.O. 155. An application to set aside a sale on the ground that there was no guardian *ad litem* of a minor in the execution proceedings is within O. 21, r. 90, 64 I.C. 25 (O.); 51 I.O. 972=23 O.W.N. 608. When a judgment-debtor died after attachment but before sale and his legal representatives were not brought on the record, it was held that it was a mere irregularity and did not invalidate the sale. 6 Pat. L.T. 67=(1925) Pat. 384; 18 O.W.N. 766=22 I.C. 95; 22 L.W. 828. The fact that there was no guardian *ad litem* of the minor in the execution proceedings is an irregularity under O. 21, r. 90, 35 C.L.J. 9=64 I.C. 25. Where the judgment-debtor died pending attachment and no notice of the subsequent proceedings in attachment was served on the guardian of the minor son, the legal representative of the deceased, it is material irregularity. 40 O. 635 P.O. Such a sale was held to be void in 20 C. 370. When a sale of the deceased judgment-debtor's property is effected by bringing a wrong person as the legal representative and without notice to the real heirs, such a sale can be set aside under r. 90 or by a suit within a year from the date of the confirmation of sale as provided by Art. 12 (a) of the Limitation Act. 25 B. 397 P.O. An objection to the sale on the ground that there was no proper representative on the record in execution is not a ground for setting aside the sale under O. 21, r. 90, 9 I.O. 252=9 M. L.T. 260. An execution sale held after the death of the judgment-debtor without bringing on the record his legal representative is a nullity. 42 O. 72 P.C.; 1926 M. 138=92 I.O. 308; 1922 M. 307 (*contra* in 1924 M. 130). When a minor attained majority after the passing of the decree and before sale in execution, but was nevertheless represented as a minor on the execution record, on an application by him to set aside the sale it was held that the fact that he knew of the proceedings throughout offered an answer to the objection even though the decree-holder was aware of his majority. 43 M.L.J. 92=15 L.W. 643, 21 M. 167; 6 L.W. 272; 39 M. 1031. When the holder of a decree for rent fails to implead the heirs of the recorded tenant as parties to the execution proceedings, a sale of the holding in execution is invalid as against them and cannot affect their interest. 67 I.O. 149. A sale of the property of the judgment-debtor (minor) without his proper legal representative but a wrong person as legal representative on the record is not a nullity but is valid until it is set aside as irregular. 25 B. 337. When the proceedings to execute the decree for rent obtained against an occupancy raiyat having been started more than a year after the judgment-debtor's death, writs of attachment and proclamation of sale were issued in his name, and returns were filed that processes had been duly served and therefore at the sale, at which no bidders attended the property was purchased by the decree-holder who got delivery of possession through Court, it was held that the execution proceedings were liable to be set aside on the ground of grave irregularity. 18 O.W.N. 1266; 27 I.C. 294.

Guardian of the minor.—An omission to bring the guardian of a minor judgment-debtor on the record is not a material irregularity. 23 O. 686; 64 I.C. 25=35 C.L.J. 9.

Notice.—Omission to give notice under O. 21, r. 22 to the judgment-debtor is a material irregularity. 43 M. 57; 20 C.L.J. 337=11 I.C. 893; 11 Bur. L.T. 40=38 I. C. 98; 42 C. 72 P.O.; 18 O.W.N. 152; 37 M.L.J. 216; 40 O. 45; 2 W.R. 74. Omission to serve a notice under the provisions of O. 21, r. 22, is not by itself sufficient

to render a sale which has subsequently been held, void, such omission would constitute a serious irregularity entitling the judgment-debtor to vacate the sale by proving that substantial injury has been the result of it. 40 O. 45. A sale without notice under O. 21, r. 22, is not a nullity but such an omission is a serious irregularity subject to vacate the sale upon an application made by the judgment-debtor under S. 47. 5 I.C. 390=11 O.L.J. 489. When a notice required by O. 21, r. 22, is not given and the omission is due not to the fact that sub-r. (2) has been applied but to the fact that notice was not asked for, a sale held in execution is void and not merely voidable as against the person to whom notice should have been, but was not, issued. 47 M. 288. Omission to give notice under O. 21, r. 22, renders execution proceedings inoperative even though a stranger may have acquired title in course thereof. 44 C. 954 ; 42 O. 72 P.C. ; 25 O.W.N. 972 ; 1926 O. 539=91 I.C. 711.

Notice as to preparation of proclamation.—A violation of O. 21, r. 66 on the ground that notice was not given to all the parties concerned before the proclamation was settled is not covered by O. 21, r. 90. 88 I.C. 831=1925 N. 320 ; (1919) M.W.N. 897=53 I.C. 809 ; 11 L.W. 59 ; 1 Mys. L.J. 105 ; 14 O.L.J. 541=13 I.C. 537 ; but *contra* see below. A sale in execution of a decree against an insolvent without notice to the Official Assignee is void, 42 O. 72. An omission to give notice to the judgment-debtor of an execution sale is more than a mere irregularity and makes the sale void. 38 I.C. 98=11 Bur L.T. 40. An omission to give notice under rule 66 before drawing up the proclamation of sale is an irregularity in publishing the sale under O. 21, r. 90. 4 L. 243 ; *contra* see above. A fresh notice is not necessary while making a fresh proclamation. 1926 O. 76=90 I.C. 351. Issue of a notice at a time when the original decree-holder was dead and before any person had come in to get himself registered as decree-holder, is an irregularity under r. 90. 22 W.R. 481. When a property was sold and resold by the Amin considering that the deposit had not been duly made and the auction-purchaser applied to set aside the second sale and the Court set aside both the sales and ordered a third sale without notice to the judgment-debtor or auction-purchaser it was invalid and should be set aside. 6 M. 197. When under a notification a special notice that the property will be sold on the day named or so soon after as its turn may come in the list of properties advertised to be sold in the manner in which the notification directed, is required, it is an irregularity to omit to issue such a notice. Without this special notice all buyers would be summoned for one day whereas the property they intended to bid for might not be sold on that day, or even for several days after, and it would be unreasonable to expect them to wait so long even if they then understood that the sale was postponed. 24 W.R. 240.

One sale in execution of two decrees.—When one sale has been effected in execution of two decrees after notification of sale in execution of both, it is quite proper and regular. A.W.N. (1881) 89.

Simultaneous process of attachment and sale.—The issue of process of attachment and sale proclamation simultaneously is an irregularity which may be a ground for setting aside a sale. 4 W.R. Mis. 11.

Notice under O. 21, r. 16.—Want of notice under O. 21, r. 16 does not vitiate attachment of the property effected on the application of the assignee of the decree when the judgment-debtor is all along cognisant that it was the assignee who was executing the decree. P.L.R. (1900) 157.

Notice of sale.—Non-service of notice of sale on any party is an irregularity. 4 W. R. Mis. 9. Change in the sale programme without notice to the intending parties and without the express consent of the judgment-debtor is a material irregularity. 12 W.R. 281. When the property of a judgment-debtor is sold in execution of a decree

against him without further notice of a date subsequent to that fixed originally and especially when the decree-holder is the purchaser for a very moderate price, it is a material irregularity. 17 W.R. 999. A postponement from one day to the next or any other without notice is a material irregularity. 17 W.R. 278; 2 N.W.P. 148. When a sale is duly notified for the 8th of a month, but owing to some cause an order for postponement to the 9th is made in open Court on that date, it was held to be a sufficient notification of that date of the sale. The operation of the notice was in fact continued and it was good for sale on the 9th. The persons who came on the 8th would have means of knowing that the sale was postponed. 18 W.R. 947. The failure to give a direction for advertisement of the sale in the Gazette does not amount to material irregularity in the conduct of the sale within O. 21, r. 90. 1 Lab. L.J. 197 = 53 I.C. 794. An omission to issue the notice required by O. 21, r. 66 (2) to be given to the decree-holder and the judgment-debtor before a sale proclamation is drawn up is such an irregularity. 18 I.C. 715. Failure to issue notice to the judgment-debtor drawing up the proclamation of sale under O. 21, r. 66 is an irregularity. 4 L. 243 (*contra* in 1 Mys. L.J. 105). It is not a material irregularity. The mere absence of a notice to the judgment-debtor of the intended sale of his property is not a material irregularity sufficient to justify by itself to set aside the sale. 52 I.C. 167 = 1 U.P.L.R. 7. Where on an application for execution notice was issued under O. 21, r. 66 and the particulars to be entered in the sale proclamation were settled, the omission of such a notice again on a succeeding application for execution does not constitute an irregularity. 24 O.C. 391 = 65 I.C. 288.

Attachment, Absence of attachment. — The absence of an attachment in execution of a decree though an irregularity does not render the sale in execution absolutely void. 44 I.C. 734; (1917) M.W.N. 89; 68 I.C. 643; 21 A. 311; 10 A. 506; 11 A. 333; 21 C. 66; 5 A. 66; 34 C. 811; 8 W.R. 9; 18 C. 188; 24 A. 311; 36 I.C. 292; A.W.N. (1899) 84; 22 C. 909 P.O.; 21 C. 639; 2 Pat. 207 = 1923 P. 45; 1923 N. 18; 30 M. 255; 34 C. 787; 18 I.C. 498 = 24 M.L.J. 70; 21 I.C. 46; 4 N.L.R. 118; 11 W.R. 226; 18 M. 437; 30 M. 245; 64 I.C. 420; 68 I.C. 363 = 3 Pat. L.T. 765; 1926 M. 211 = (1925) M.W.N. 887. The absence of a regular perfected attachment amounts at the most to an irregularity which does not affect the validity of the sale after it has been duly confirmed. 5 I.C. 798 = 13 O.C. 43; 13 C.L.J. 243. But the position is different when the objection is taken before the sale takes place. In such a case it is the duty of the Court to ensure the compliance with the provisions of the Code. 13 C.L.J. 243; 42 I.C. 259; 35 I.C. 469 = 10 Bur. L.T. 6. An error in the warrant of attachment (recording a wrong number of the plot) is a material irregularity. 40 P.R. 1910. When the judgment-debtor does not reside on the land attached, but lives in a different district, the affixing of a notice of attachment in a not very conspicuous part of the land is not sufficient to satisfy the requirements of justice. 25 W.R. 364. When it did not appear that there was any town or village within the *purgannah* at which a notification required by the provisions of Bengal Act XLV of 1793, S. 12 could be affixed, there had been no irregularity in posting the notice at the house of the judgment-debtor. 8 M.I.A. 427 = 1 Sar. 803. When an attachment was effected by a warrant signed not by the judge but by the *munsarim* of the Court the sale is irregular and may be set aside in favour of subsequent purchaser. 7 A. 506 P.C. Failure to comply with the provisions of O. 21, r. 54 (2) as to the promulgation of the order attaching the property which the decree-holder seeks to sell in execution of his decree is also an irregularity in publishing the sale. 18 I.C. 715. Attachment and sale of a mortgage debt as immovable instead of moveable property is a mere irregularity and not a material irregularity when the judgment-debtor was not prejudiced thereby. 18 M. 437 (*contra* was held in 5 A. 86; 10 A. 506; 7 A. 38).

An execution sale held without attachment of the property or with a defective attachment is not void but materially irregular. An application to set aside a sale on that ground falls under O. 21, r. 90 and not S. 47. 1 R. 533. The fact that the property sold was not liable to attachment is no reason for setting aside a sale; though it would be a good ground for a fresh suit to recover the property or to claim compensation. 19 P.R. 1884. When property which had been already under attachment at the instance of a creditor to enforce part of a debt accrued due in a mortgage transaction at an earlier period was sold in execution of his decree for instalment subsequently due from the same debtor, a second order of attachment would be an empty formality and is not necessary to validate the sale, 15 B. 222 P.C. A regularly perfected attachment is an essential preliminary to sales in execution of simple money decrees and a sale without attachment is *ipso facto* void and not only voidable, 10 A. 506; 6 A. 86 F.B.; 7 A. 702; 42 I.O. 259. That which is sold in a judicial sale in execution of a decree for money can be nothing but the property attached. Property that has not been attached cannot be sold. 41 C. 590 P.C.

Bidding at an auction.—The fact that the decree-holder purchaser dissuaded others from bidding at a Court sale and thus caused the property to be sold at a low price is not a sufficient ground for setting aside the sale. 23 M. 227 P.C.; 102 P.L.R. 1911=9 I.O. 816; A.W.N. (1882) 138. Acts done by bidders other than decree-holders or by by-standers at a public sale without the knowledge of the Court, or private understandings between private bidders cannot amount to an irregularity in conducting the sale such as will render it liable to be set aside under r. 90. 12 O.P.L.R. 404; 17 C. 152. When a decree-holder who has obtained permission to bid or his agent dissuades others from purchasing at the sale it is a sufficient ground for setting aside the sale. 7 C. 346. When an intending bidder (the decree-holder) uses language in disparagement of the property for deterring by-standers from bidding for it, it is a material irregularity. 5 C. 308. A sale is impeachable on the ground that no auction sale took place and the whole proceeding is *de facto* void and cannot stand. A.W.N. (1881) 106.

Re-issue of process after striking off of a case, required by law is not a material irregularity. W.R. 1864, 359. The mere fact of *karkuns* of the decree-holder, reading aloud notices of lien on property about to be sold by auction is not a material irregularity under O. 21, r. 90. 4 B.H.O. A.C. 164.

Selling the whole or a part of the property.—When the whole of a judgment-debtor's property was ordered to be sold instead of a portion which would be sufficient to satisfy the decretal debt the irregularity was one causing substantial injury. 23 W.R. 1. An execution sale is not invalid merely because the property sold is only a portion of the property proclaimed for sale. 5 P.L.T. 443=78 I.O. 313. When the judgment-debtor owned a share in a house, but the whole of it was sold, it amounted to a material irregularity. 222 P.L.R. 1911=12 I.C. 579. When a decree is passed severally against several persons a sale of property held by them all is a material irregularity. 5 I.C. 647. The fact of the sale having been made for a larger sum than was actually due is not a defect that could go to vitiate the sale especially after the purchaser had received the certificate of sale after confirmation of it. 1 N.W.P. 61.

Sale of property exempted from sale.—Although the auction-purchaser's title might be challenged by the zemindar or co-sharer in such holding on the sale of an occupancy holding, it is impossible to hold that the officer conducting the sale was guilty of an irregularity in accepting the bid. A.W.N. (1881) 40, 60.

Sale in lots or in a lump.—The selling of property in a lump sum instead of in separate lots as per lot as advertised for sale in the notification is an irregularity in the

conduct of the sale. 12 W.R. 492; 12 W.R. 282. Sale of property in various lots is not an irregularity; rather it is a prudent step. 21 M. 417.

Purchase by decree-holder.—The fact that the decree-holder purchased without the permission of the Court does not *ipso facto* invalidate the sale. It is merely an irregularity. 14 W.R. 405; 11 O. 731; 21 O. 554; 32 M. 242. In setting aside a sale under r. 72, on account of the decree-holder's failure to obtain permission to bid at the sale it is not necessary to see whether the judgment-debtor has sustained loss by the sale. (1921) M.W.N. 535=62 I.C. 854.

When the selling officer as announced in the proclamation of sale is different from one appointed by the Court, the sale is illegal. 44 M. 35.

When the place of sale as announced in the proclamation of sale is different from that fixed by the Court the sale is illegal. 44 M. 35. A mistake in the proclamation as regards the place where the sale is to take place is a material irregularity. 132 P.R. 1906; see also 9 A. 511. But if the place being well-known, nobody is misled by the proclamation and no prejudice is caused to the applicant the setting aside of the sale is not justified. 68 I.C. 916=41 M.L.J. 465. Holding the sale of the judgment-debtor's immovable property at a place different from that fixed in the proclamation of sale, but of which the judgment-debtor was held not to be ignorant does not vitiate the sale. 33 B. 657.

Sale effected when there is an order for stay of sale.—A sale of property before the order postponing it reached the officer conducting it may be set aside on the ground of material irregularity. 6 N.W.P. 354; 4 N.W.P. 135; 3 A. 424; 54 I.C. 928. When an order of postponement is made and the sale is conducted by the officer the order not being communicated to him, it is made without authority and the Court reviewing its order of confirmation does not act *ultra vires* or improperly and also in setting aside the sale. 2 A. 666. The effect of an order postponing a sale in execution of a decree is to deprive the conducting officer of all legal authority to hold the sale on the day previously fixed, and his not being aware of the order is immaterial. Such a defect in the sale amounts to more than an irregularity in the conduct of the sale and there is no necessity to prove substantial injury to the judgment-debtor for setting aside the sale as void. 12 A. 96; 9 O.C. 289; 5 M.L.J. 70; 10 A. 166. An order of injunction by the superior Court suspends the powers and jurisdiction of the lower Court, from the moment the order is made, even though it may not be communicated to the lower Court, and an execution sale made after a stay order is passed is invalid even though it may have taken place in ignorance of the order. 38 M. 766. A sale held in spite of the injunction is materially irregular. 38 I.C. 532=1925 O. 424. When the High Court directed the stay of execution on security but the judgment-debtor did not offer it, but on the date of sale offered a hypothecation bond unregistered and unauthenticated as security which was rejected by the officer conducting the sale, there was held to be no irregularity in publishing or conducting the sale on the ground offered that there was an impression abroad that the sale had been postponed and consequently very few persons assembled at the sale and the property fetched an inadequate price. A.W.N. (1881) 104. When the District Court in spite of an injunction by a Sub-Court restraining the decree-holder from selling the property, sold the same, the sale was set aside and the money deposited in Court was refunded to the purchaser. 3 Pat. L.T. 645=1922 P. 385. When an injunction was granted in favour of third parties who claimed the property as their own against the decree-holder, restraining him from executing his decree by sale, but no notice was given either to the decree-holder or the officer conducting the sales and in consequence the sale took place, the validity of the sale cannot be questioned and the injunction is ineffective 1922 A. 282. A sale in execution after an order of postponement by Court is void, though the officer conducting it was not aware of the order. 19 A.L.J. 225=62 I.C. 687. An auction sale which was made under the authority of an order which at

the time of sale] was not in force, but was superseded by a subsequent order postponing the sale is null and void. 3 Agra 998. An order of the appellate Court to stay execution of a decree against which an appeal is pending is in the nature of a prohibitory order and as such would only take effect when communicated. If property is sold before such an order is communicated to the Court holding the sale, such sale is not void and cannot be treated as a nullity, 1 C.W.N. 226. When an order has been made postponing a sale in execution of a decree, the sale if it has been made before the order reached the hands of the officer, conducting the sale, becomes void. A.W.N. (1881) 19. An *ex parte* order for stay of an auction sale was obtained by fraud and it was subsequently discharged by the judge who passed it. Before the *ex parte* order was set aside the sale was held and the property sold, held that the sale was not void. 14 A.L.J. 46=43 I.C. 656.

Stay of sale.—There is no law authorising the officer conducting the sale to stop it because the judgment-debtor offered to pay the debt to the decree-holder and such a sale cannot be set aside on the ground of irregularity. 3 B.H.C. A.C. 110. Postponement of sale, when the bid of the decree-holder was the highest, on account of the representation of the judgment-debtor who hoped to obtain larger price by private sale than was offered at the auction is irregular and objectionable and the Court is not justified in postponing the sale as there is no reasonable ground to believe that the amount of the price would thus have been raised. 1 Agra Mis. Appl. 11. When a sale took place notwithstanding the consent of the decree-holder to a petition by the judgment-debtor for postponement which was however presented to a wrong Court by mistake, it was a material irregularity. 11 C. 136 P.C. 17 C.; 769 F.B.; 13 C.W.N. 710.

Non-payment of preliminary deposit under O. 21, R. 84.—Delay in making a deposit under O. 21, r. 84, is not more than a material irregularity which does not vitiate the sale unless it has caused substantial injury. 79 I.C. 747=2 Bur. L.J. 166; 16 C. 33; 14 M. 227; 3 L.B.R. 225; 67 I.C. 427; 11 P.L.R. 1907; 28 A. 238. In some of the Allahabad rulings it is held that if the deposit is not made immediately there is no sale. 5 A. 316; 30 A. 273; 30 I.C. 230. But a non-payment of the deposit at all makes the sale invalid. 9 I.C. 66=15 C.W.N. 350.

The mere inadequacy of price, is not a material irregularity, when the property is sold to the highest bidder. 8 B. 424; 14 M. 227. Sale at a low price is not *per se* a ground for setting aside a sale though, if there were any irregularity in publishing or conducting it, it might be presumed that the applicant had sustained injury from such irregularity. A sale cannot be set aside by the Collector on the mere ground that after the sale was completed another person offered a higher price. 15 B. 694; 19 B. 216; 23 B. 531.

O. 21, r. 53.—When a mortgage suit by B. against A. and D. was dismissed with costs against A. but decreed against A. and in execution of his decree A. attached the decree of B. against D. and having got himself substituted as attaching decree-holder executed the decree and a share of the mortgaged property was sold, the sale though irregular was not void, but could be set aside by proper proceedings. 25 C.W.N. 400.

Sale contrary to direction in decree.—A sale in contravention of the terms of the decree which directed those properties to be sold after certain other properties was treated as held with material irregularity in the exercise of the jurisdiction of the Court. 16 C.L.J. 557=16 I.C. 295. A sale cannot be set aside under this rule on the ground that the property not covered by the decree had been proclaimed for sale and sold. 22 A.L.J. 1119=84 I.C. 746.

Absence of order absolute.—That an order absolute of sale had not been obtained is not a material irregularity. 1 O.C. 155.

Omission to get the sanction of the Financial Commissioner under Notification No. 1297 of 10-9-1885, was a material irregularity. 5 P.R. 1888. But under the present law such sanction is not necessary. That the sanction of the Commissioner or Deputy Commissioner was not obtained as required by S. 20, Act XVIII of 1876, is an irregularity. 1 O.C. 155. Sanction of Commissioner to sale of ancestral property given after the sale effected is not sufficient. 14 O.C. 115 = 11 I.O. 346.

Sale by Court or Collector.—A sale of immovable property by a Civil Court in execution of a decree which should, under rules framed by the Local Government under the C. P. Code, have transferred to the Collector for execution is liable to be set aside on the ground of material irregularity. A.W.N. (1885) 319 ; 4 A. 382 ; (not followed in 28 A. 273) When property which was sold under a decree is property which had been granted to the judgment-debtor for good services and is consequently such as should have been sold by the execution case being transferred to the Revenue Courts, but all the orders were passed and issued by the munsiff, the proceeding is more than an irregularity and the sale should be set aside. A.W.N. (1887) 32. When the decretal amount of Rs. 7,122 which bore interest till realisation grew into a debt of Rs. 31,000, the plea of the judgment-debtor that the decree-holder held out hopes to him that he would allow him time to pay the debt is no ground for setting aside the sale. 26 W.R. 106.

THERE MUST BE SUBSTANTIAL INJURY.—Omission to state the amount of revenue is not itself sufficient to invalidate the sale. 6 C. 656 ; 12 M. 19 P.O. Where the valuation of property in the proclamation of sale is inadequate, but the price fetched at the auction is adequate, the sale cannot be set aside inasmuch as the judgment-debtor suffers no injury. 57 I.O. 892. In the absence of proof of substantial injury to the judgment-debtor, an auction-purchaser's omission to deposit the 25 per cent. deposit in court is a mere irregularity and does not vitiate the sale. 67 I.O. 427 ; 28 A. 238 ; 16 C. 33 ; 14 M. 227 (*contra* in 30 A. 273 ; 5 A. 316). Mere proof of irregularity is not enough. Substantial injury as a result thereof must also be proved. 22 M. 440 ; 57 I.C. 892 ; 21 C. 66 ; 11 C. 658 ; 21 A. 140 ; 75 I.O. 784 ; 9 C. 656 ; 1 Mys. L.J. 105 ; 70 I.O. 900 ; 80 I.C. 223 ; 68 I.C. 363 ; 67 I.O. 752 ; 78 I.O. 746 ; 12 M. 19 ; 14 A. 141 ; 18 A. 37 ; 83 I.C. 1024 ; 2 Pat. 207 ; 41 M.L.J. 465 ; 9 A. 511 ; 19 B. 276 ; 28 A. 238 ; 57 I.O. 892 ; 75 I.O. 185 ; 83 I.O. 430 ; 71 I. C. 730 ; 32 I.O. 990 ; 4 Lah. L.J. 441 ; 29 A. 196 ; 39 C. 26 ; 96 P.L.R. 1902 ; 11 L.W. 477 ; 2 W.R. Mis. 1 ; 11 W.R. 114 ; 19 W.R. 78 ; 22 W.R. 550 ; 24 W.R. 227 ; 18 A. 37 ; 11 A. 333 ; 7 C. 34 ; 7 C. 730 ; 8 C. 932 ; 53 I.C. 794. Injury means loss which is wrongful and when a person loses what he has been in the habit of wrongfully gaining it is not substantial injury or injury of any sort. 7 C.W.N. 439. Substantial injury does not necessarily mean pecuniary loss. 1925 A. 459 = 87 I.C. 278. Where four plots of immovable property were sold in execution and it was found that there was substantial injury caused to the judgment-debtor with regard to one of the plots, but not with regard to the other three, the Court was not bound to set aside the sale of all the four plots. 18 C.W.N. 947 = 24 I.C. 64. Where in a sale by the Official Referee the sale proclamation did not mention the place of sale, but it was found that the sale was well attended and no possible bidder kept away on account of the non-mention of the place of sale, the omission was only an irregularity and as the parties were not prejudiced thereby there was no ground for setting aside the sale. 41 M.L.J. 465 = (1921) M.W.N. 736. An irregularity which does not prejudice the judgment-debtor does not vitiate a sale when execution is taken out on an earlier decree in appeal (which was afterwards reversed) and continued even after a final appellate decree was passed, the irregularity was one which did not prejudice the judgment-debtor. 1 A. 212 F.B. When there were proved to have been irregularities in an execution sale, an application to have it set aside was refused when it appeared that the applicant had been

present at the sale and purchased the property himself and no substantial injury resulted from the irregularity. 8 O. 932; 11 A. 393; 5 M.L.J. 70. Where there is an irregularity (such as, postponement) by which the judgment-debtor is benefited, the sale cannot be set aside on his application. 17 W.R. 210. A court is barred by the proviso to the section from setting aside the sale without going into the question of substantial injury. 46 I.C. 84 = (1918) Pat. 284. When the time and place of resale were not mentioned in the proclamation of sale, but the inadequacy of price on resale was not proved, the sale was not vitiated by any illegality. 1925 M. 631 = 21 L.W. 232.

SUBSTANTIAL INJURY.—Injury means loss which is wrongful. When a person loses what he has been in the habit of wrongfully gaining it is no substantial injury or injury of any kind. 7 O.W.N. 439. Where a property fetched Rs. 260 at a sale and Rs. 50 only at a resale it was held that there was substantial injury to justify a setting aside of the resale, when both the sales took place one after the other immediately. 9 O. 98. Substantial injury cannot be said to have been suffered simply because further remedies against the judgment-debtor may be barred by limitation or by some technical rule of law. 15 I.C. 728. A debtor may be seriously injured if the attachment or proclamation be not duly made, for bidders will not be in attendance. 6 W.R. Mis. 45. For the purposes of finding out the injury, the market value of the property is not the value which ought to be taken as the standard at an auction sale in execution proceedings. In a private sale a purchaser gets a title and the title deeds. In an execution sale he gets ordinarily neither, but only the right, title and interest, whatever that might be, of the judgment-debtor at the time of sale. 18 W.R. 197.

SUBSTANTIAL INJURY MUST BE THE RESULT OF THE IRREGULARITY OR FRAUD.—The judgment-debtor must prove by evidence that the alleged inadequacy of price resulted from the alleged irregularity. 1 O.C. 186; 6 O.C. 61; 11 O. 200. It is only if substantial injury be caused by reason of irregularity or fraud that the applicant can claim to have the sale set aside. 6 W.R. Mis. 126; 7 C. 34; 3 W.R. Mis. 11; 4 W.R. Mis. 4; 10 W.R. 3; 11 A. 233; 9 O. 656; 20 L.W. 736 = 1925 M. 204. To show that substantial injury was the result of the irregularity complained of the judgment-debtor is only to show that there is reason for inferring that it was due to and resulted from material irregularity. 6 C.W.N. 49. When the value shown in the sale proclamation was fixed by consent, the fact that the price fetched at the sale was considerably less is not enough to set aside a sale. 1 Pat. 214 = 1922 P. 550. The applicant must have sustained substantial injury by reason of such fraud or irregularity. 25 I.C. 18; 37 I.C. 964; 9 O. 656; 12 M. 9 P.C., 1 A. 212 F.B.; 56 I.C. 523; 15 C. 488 F.B.; 67 I.C. 885; 34 I.C. 990; 63 I.C. 1048 = 22 A.L.J. 413; 5 L. L.J. 30 = 71 I.C. 730; 20 I.C. 192 = 6 Bur. L.T. 65; 10 I.C. 55.

PROOF TO CONNECT SUBSTANTIAL INJURY WITH MATERIAL IRREGULARITY OR FRAUD—Presumption.—The relation of cause and effect between a material irregularity, and inadequacy of price may either be established by direct evidence, or be inferred, where such inference is reasonable, from the nature of the irregularity and the extent of the inadequacy of price. The notification of an incumbrance which did not really exist is an irregularity which may cause inadequacy of price. 20 O. 599; 6 C.W.N. 886; 24 O. 291; 31 O. 616. It is not necessary to produce a witness or a document to prove that people were in fact deterred from bidding by the irregularity complained of. An inference may be drawn by the Court. 6 O.C. 61. On proof of the great inadequacy of price and a material irregularity, there arises a presumption that

the inadequacy of price was caused by the irregularity. 7 O. 466 ; 12 M.L.J. 97 ; 20 M. 159 ; 20 L.W. 736—1925 M. 202 ; 5 Pat. L.T. 250. Where there are material irregularities in publishing the sale and the property fetched a very inadequate price and there were only a few bidders, and other persons would have bid at the sale had they known when it was to be held and a very much higher price than the estimated price might have been fetched had other persons known of the date of sale it may be inferred as a matter of fact that the inadequacy of price was due to the paucity of bidders which was directly the result of the irregularity in publishing the sale. 6 O.W.N. 144 ; 30 O. 1 ; 9 O. 656 ; 20 O. 599 ; 24 C. 291 ; 24 A. 412 ; 132 P.R. 1906 ; 31 O. 815 ; 6 O.W.N. 48. Sale at a low price is not *per se* a ground for setting aside a sale, though if there were any irregularity in publishing or conducting it might be presumed that the applicant had sustained injury from such irregularity. 19 P.R. 1884. When the value put at a sale was Rs. 9,000, the decree holder himself making a bid of Rs. 8,762 ; but the sale was postponed, and the value put in subsequent sale was Rs. 5,000 only, and the decree holder purchased it for that amount, there being no other bidder, *held* that the value could not be less than Rs. 8,762, and the inadequacy of price resulted from the under-valuation and the sale was liable to be set aside on that ground. 57 I.O. 640—1 Pat. L.T. 441. When property has been put up for sale valued at a sum far below its real value and that property has been sold also for an absolutely inadequate price, and no explanation is forthcoming to account for the lowness of the price realised, it is possible in some cases to infer that the inadequacy of price was due to the under-valuation of the property. In cases in which a property is knocked down to a decree-holder in the absence of other bidders, an under-valuation is almost invariably a cause of serious prejudice to the judgment-debtor. (1917) Pat. 353—42 I.C. 394. Conducting a sale at a place different from one advertised in the proclamation of sale is a serious irregularity which may well be presumed to cause substantial injury by keeping away bidders ; no proof of substantial loss is required in such a case. 132 P.R. 1906. In the absence of evidence to connect an injury with an irregularity, the one must to justify the setting aside of a sale at least flow reasonably and naturally from the other and be attributable to it alone. 11 O. 74 ; 11 C. 658 ; 11 A. 333. The failure to comply with the requirements of O. 21, r. 69 together with a paucity of bidders on the date of sale owing to which the sale fetched an inadequate price for the property sold are sufficient grounds for setting aside a sale. 24 C. 291 ; 4 L.B.R. 123 ; 6 C.W.N. 44 ; 6 O.W.N. 48 ; 96 P.L.R. 1902 ; 9 Bom. L.R. 651 P.C. ; 12 M. 19 P.O. ; 6 O.C. 61 ; 30 O. 1 ; 31 C. 815 ; 132 P.R. 1906 ; 6 O.W.N. 836. When the prescribed notice of the postponement of an execution sale is not given, it might be presumed that there had been an absence of bidders from which alone substantial injury must probably have arisen to the judgment-debtor. 3 C. 542 ; 3 W.R. Mis. 11, (referred to in 7 O. 466 ; 7 O. 730 ; 9 O. 544). Substantial injury cannot be presumed from the fact of a material irregularity in the proclamation of an execution sale, though, on proof of both the irregularity and the injury the Court will presume the latter to be due to the former. 7 C. 730. Where the sale in execution of a decree is effected for an inadequate price resulting from under valuation in the proclamation, the sale should be set aside. (1921) Pat. 75—57 I.C. 640. When it was patent on the face of the proceedings that an inadequate price was obtained on account of some irregularity (omission to specify the Government Revenue in the sale proclamation) the sale may be set aside. 9 C.L.R. 134. In the absence of evidence to connect an injury with an irregularity in an execution sale, the one must to justify the setting aside of an execution sale at least flow reasonably and naturally from the other, and be attributable to it alone. 11 O. 74 ; 11 C. 658 ; 11 A. 333. When the decree-holder himself purchased the property for a very low price in consequence of the indefinite postponement, it was *held* to cause substantial injury. 25 W.R. 328. Where a material irregularity in the conduct of a sale is proved and it is also proved that the price realised is much below the true value of it, it may be ordinarily inferred that the low price was a

consequence of the irregularity, even if the manner in which the irregularity caused the low price be not strictly proved. 20 M. 159=6 C.W.N. 48. Some casual connection must be shown between the irregularity, and the inadequacy of price which the properties fetched at the sale. 33 I.C. 692=(1916) 1 M.W.N. 256; 1 O.C. 14; 1 O.C. 155; 57 I.C. 892; 16 I.C. 396; 46 I.C. 84; 5 Pat. L.W. 15. A judgment-debtor, who must have known what description of the property had been given in the sale proclamation, should not lie by, allow the sale to proceed and then come forward to get the sale set aside alleging the irregularity of misdescription. He must prove substantial injury. 12 M. 19 P.O.; 9 C. 656 P.O.; 21 O. 66 P.O.; 18 A. 41; 13 A. 564; 5 M.L.J. 70; 24 C. 291; 10 C. 186; P.L.R. (1900) 161; 4 O.C. 391; 8 C.W.N. 257; 4 O.C. 379; 6 O.C. 61; 31 C. 815; 34 C. 509; 32 C. 542; 28 A. 273; U.B.R. (1907) 2nd, Qr. O.P.C. 311; 96 C.L.J. 62=11 C.W.N. 848; 14 C.L.J. 541. It is not to be presumed from the proved existence of the irregularity in the absence of evidence to show that injury is the result of irregularity. 11 C. 538. The Court cannot without evidence and upon a mere supposition properly find that the non-statement of the revenue in the proclamation of sale caused an injury to the applicant by causing an inadequate price to bid at the sale. 9 C. 656; 12 M. 19 P.O. A substantial injury cannot be said to have been caused by reason of the words "*koi dariast nahim hua*" unless it is proved that a possible bidder was prevented from bidding. 30 P.R. 1899. A person seeking to set aside a sale on the ground of irregularity in the conduct of sale and of consequent loss to himself must adduce evidence to connect the irregularity with the loss. 32 I.C. 990; 21 C. 66; 45 I.C. 212. An opportunity should be given to the judgment-debtor to show that he had suffered substantial injury by reason of material irregularity. 9 I.C. 383.

FRAUD IN PUBLISHING OR CONDUCTING THE SALE.—Understatement of the price of the property in the sale proclamation does not amount to fraud. 1 I.C. 246; 11 I.C. 295; 15 C.W.N. 965; 11 I.C. 498=16 I.C. 704; 1926 O. 577=91 I.C. 407. A wilful misstatement by the decree-holder in the sale proclamation of the value of the property may be sufficient evidence in particular cases to justify an inference of fraud. 3 Pat. L.T. 501=1922 P. 507; 34 M. 148.; A false representation on the part of the decree-holder amounts to fraud. 3 A. 568. But a mere understatement of price in the sale proclamation does not by itself amount to fraud on the part of the decree-holder. 15 C.W.N. 965=11 I.C. 295. The conduct of the decree-holder in offering bids through a benamidar considerably in excess of the value which he deliberately stated in the sale proclamation is calculated to mislead and is consequently fraudulent. 13 C.L.J. 312=6 I.C. 135. Acting of the bidder in such a way as to prevent best price being offered does not amount to fraud. 1926 B. 33=91 I.C. 426. Any irregularity should not be taken to be fraud. A finding of fraud should be reserved for that which is dishonest and morally wrong and it is not sufficient to come to a vague general finding of fraud. Actual fraud must be established. 38 O. 622; 15 C.W.N. 875. The fact that the judgment-debtor's pleader was going to apply for an adjournment of sale and consequent omission to be present and bid at the sale does not amount to fraud; even if the alleged representation of the judgment-debtor's pleader be true, the auction-purchaser was not responsible. 11 I.C. 399=15 C.W.N. 648 P.O. Fraud is not to be lightly charged or lightly found, especially in cases of applications to set aside sales, when this reserve is often neglected. Misstatement of value, even if it can be described as fraud, does not constitute fraudulent conduct. 16 C.W.N. 894=16 I.C. 464. Fraud cannot be presumed merely from low price. 1926 O. 45=89 I.C. 107. The false description of the judgment-debtor's interest as a complete interest is a fraudulent misrepresentation which vitiates the sale. 34 M. 148. General allegations of fraud unaccompanied by particulars are insufficient even to amount to an averment of fraud, of which any court ought to take notice. 17 C.W.N. 524=14 I.C. 53=36 C. 104. Fraud should be specifically set out with all the necessary details so as

to enable the opposite party to meet a specific set of assertions. 51 I.C. 447. Where the decree-holder agreed not to hold the sale if payment was made within a certain time and he then sold the property in contravention of this arrangement, *held* that this amounted to fraud in the matter of the conduct of the sale within O. 21, r. 90. 3 Pat. L.J. 645=48 I.C. 560. Purchase of property by the benamidar is fraud. 33 I.C. 574. When in execution of a decree for a sum of three Rupees, landed property of the judgment-debtor was attached and sold and the sale was conducted by a common peon of the Nazir's Office, the judgment-debtor heard of what had happened, he went to the court and deposited the money due under the decree *held* that the circumstances gave rise to the inference that what was done was done behind his back and was sufficient to raise a case of fraud. 11 W.R. 297. An agreement between persons not to bid at an auction sale under the execution of a decree is not an irregularity for setting aside a sale. When persons act in concert at such a sale in such a way as to prevent the best price being obtained the action does not amount to fraud, nor is it an irregularity contemplated by r. 90. 2 Bom. L. R. 640=23 M. 227; 78 I. C. 108. When a decree-holder obtained leave to bid at an auction sale and purchased the property, his omission to disclose to the court an agreement by which he promised to convey the property to a third person on certain terms, provided the latter dissuaded others from bidding at the sale amounts to a fraud on the court. 19 M. 315; 36 C. 226; 31 C. 715; 1 C.L.J. 85. A charge against the decree-holder that he acted in concert with others and hence the price recovered was less than market price does not amount to fraud. 23 M. 227 P.C. A sale may be set aside under O. 21, r. 90, on the ground of fraud even though it is not proved that the auction-purchaser was a party to it. 18 I.C. 715; 72 I.C. 625=4 Pat. L.T. 306 6 C.W.N. 283; 2 C.W.N. 691; 4 C.W.N. 538; 26 C. 324; 8 C.W.N. 230; 24 W.R. 260; 74 I.C. 975=27 C.W.N. 587. Where six tenures with separate recorded Jammās were lumped together and described as a tenure and sold as one lot, and there was an omission to describe the properties to be sold in the sale proclamation, and in consequence the auction-purchaser was the only bidder and he purchased the property for an inadequate price, the sale was held to be fraudulent. 18 W.R. 342. Obtaining the approval of the court to a sale by misrepresentation, or by withholding of material information through the absence of which the information furnished is misleading amounts to fraud. 29 B. 615. When on the first day of sale the judgment-debtor's partner's bid was not accepted, and on the second day there was some understanding between the partner and the decree-holder that the former would get the property back for the amount of the decree, and the property was purchased by the decree-holder, it was *held* that there was no fraud on the part of the decree-holder. 36 C. 226. From a failure on the part of the decree-holder to serve notices it may be inferred that he had a hand in the non-service of the necessary processes, but there must be clear and definite finding that the decree-holder was implicated in the matter and a mere finding that there was no service will not be sufficient. (1923) Pat. 298=83 I.C. 747. If there has been any perjury or false statement in respect of a service at which the identifier was required to be present, that will be sufficient to connect the decree-holder with the alleged fraud. (*ibid*). Mere irregularity in the issue of processes will not of itself prove fraud even when the auction bids were so small as to excite suspicion. 24 W.R. 388. When a pleader obtains the permission to bid for his client, but makes the purchase for himself, the sale may be set aside on the ground of fraud. 15 M. 389. Where the judgment-debtor is made to believe by the creditor that the adjustment is certified, the sale effected notwithstanding may be set aside on the ground of fraud. 21 M. 356. The purchase of property by a decree-holder in the name of another at a price less than that at which he obtained permission to bid amounts to fraud. 5 C.W.N. 265; 29 C. 395 P.C.; 16 O.O. 86. The facts that the decree-holder took out execution for a larger amount than what was due does not make the sale fraudulent. 14 I.C. 839=15 C.L.J. 423. The case is covered by this section even if

the fraud is committed after the publication of the sale proclamation. 48 I.C. 560 = 3 Pat. L.T. 645.

PROOF OF FRAUD—ONUS.—The onus of proving fraud rests on the party alleging it and in every case a plea of fraud must be precise and definite in its particulars. Fraud is not to be legally presumed, but must be established by clear and definite evidence. 150 P.W.R. 1909. When a sale held in execution is alleged to be fraudulent, colourable or collusive, the onus of proof lies on the person who alleges it. 15 W.R. 131. Fraud is not established by the proof that the decree-holder and the auction-purchaser conspired together not to bid against each other. 150 P.W.R. 1909; 23 M. 227 P.O. It is not enough for the court to find that the mode of making attachment and proclamation was not according to law, but it must consider looking to all the surrounding circumstances of the case whether the alleged fraud is proved or not. 14 W.R. 325. An understatement of the value in the sale proclamation cannot of itself justify an inference of fraud on the part of the decree-holder. 15 C.W.N. 965. A person alleging fraud must state in detail in facts constituting fraud. A vague allegation of fraud cannot be accepted. The applicant must state clearly in his petition as to how he was kept from the knowledge of the execution proceedings and the sale, and how the fraud was practised and how he came to know of the sale, mere want of diligence is not fraud. (1921) Pat. 181 = 61 I.C. 823.

PARTIES TO THE APPLICATION UNDER O. 21, R. 90—The decree holder is a necessary party to an application under this rule. 15 A. 407; A.W.N. (1891) 121; 80 I.C. 648. An application to set aside a sale will not be entertained if the auction-purchaser who is a necessary party to the application is not impleaded within the time allowed by law for making the application. 2 Pat. L.J. 336 = 62 I.C. 61; 50 I.C. 5. Under the old Code the auction-purchaser was not a necessary party. 39 O. 687; 3 P.R. 1897. There is no necessity for a judgment-debtor filing an application under O. 21, r. 90 to set out any formal array of parties. His application would be sufficiently described as an application under this rule in case number so and so of such and such year. A.B. plaintiff v. C.D. defendant. 25 I.C. 907 = 17 O.O. 306. A transferee from an auction-purchaser is a necessary party to a proceeding for reversal of the execution sale when such proceeding is commenced after the transfer has been effected, on the ground that no person should be deprived of the property in any judicial proceeding unless he has an opportunity of being heard. 39 O. 881. All persons affected by the sale are necessary parties to the proceedings under this rule. see O. 21, r. 92 (2). A person alleged by the auction-purchaser as the real purchaser is not a necessary party to proceedings to set aside a sale. 1 L.W. 412 = 24 I.C. 44.

LIMITATION.—The application must be made within thirty days of the date of sale under Art. 166 of the Indian Limitation Act, 1908. An application to set aside a sale on the ground of fraud is governed by Art. 166 of the Limitation Act. 81 I.C. 844 = 20 L.W. 242. Joinder of the decree-holder as a party after the period of limitation is a bar to the application by limitation. A.W.N. (1891) 121; 15 A. 409. When a person who bid at the auction did not disclose that he was acting as an agent for another and as a result the real purchaser was added as a party after more than the allowed period of 30 days, the application was not time-barred when the ostensible purchaser was joined within 30 days. 1923 A. 462. The whole sale can be set aside on an application by one of the judgment-debtors and the applications by the other judgment-debtors though made after time may be considered as ones for adding as parties in the first application. 16 C.W.N. 704 = 11 I.C. 438. Thirty days' limitation does not apply when the sale sought to be set aside is a nullity and not merely irregular. 28 I.C. 251 = 26 M.L.J. 267.

Extension of time.—When the sale has by fraud of the decree-holder or other parties to the sale been kept concealed from the judgment-debtor he is entitled to apply and the time for making the application is to be computed from the date when the fraud first became known to him. 17 O. 769 F.B. ; 30 O. 142 ; 3 O.W.N. 353 ; 40 P.R. 1910 ; 5 Pat. L.T. 200 ; 28 O.W.N. 56 ; 14 O. 679 (dissented from in 40 P.R. 1910) ; 4 Pat. L.T. 306=72 I.C. 625. The period of limitation may be extended under S. 18 of the Limitation Act. 1 O.W.N. 67 ; 72 I.C. 625=4 Pat. L.T. 306 ; 1922 P. 422 ; 61 I.C. 823 ; 83 I.C. 747=5 Pat. L.T. 61 ; 86 I.C. 745 ; 87 I.C. 555 ; 85 I.C. 622=(1925) Pat. 521. The Court must find as a matter of fact the date when the sale came to the knowledge of the applicant. 48 I.C. 970. S. 18 of the Limitation Act applies to such fraud as amounts to concealment and is intended to keep from the injured party the knowledge of the wrong or its remedy. 15 O.W.N. 965. To avail himself of S. 18 of the Limitation Act, the applicant must show that he was by fraud kept from the knowledge of his right to apply for the sale to be set aside. 51 I.C. 447. It is not competent to the Court to come to the conclusion that an application to set aside a sale under O. 21, r. 90 made more than 30 days from the date of sale falls within the provisions of S. 18, Limitation Act, without finding as a fact the date and time when the applicant came to know of the sale. 48 I.C. 970. In order to bring the case under S. 18 of the Limitation Act it is not enough for the applicants to show that the execution proceedings were irregular and fraudulent, but he must carry the fraud further and show that the existence of his right to set aside the sale has been kept concealed from his knowledge by the fraud of the decree-holder or the auction-purchaser. 1 O.W.N. 67 ; 1926 C. 229=87 I.C. 555.

When the period begins.—The time for an application to set aside a sale on the ground of fraud begins to run not from the date when the applicant becomes aware of the sale but from the date when the applicant gets a definite knowledge as to fraud and the burden of proving that the application is time-barred is on the other side. 48 O. 119. A decree-holder who is once guilty of fraud in bringing about an execution sale and keeping the judgment-debtor in ignorance of it must show that an opportunity was offered to the judgment-debtor to discover the fraud and the fraud was in fact disclosed subsequent to sale ; otherwise the fraud once committed would continue and the judgment-debtor would be entitled to the benefit of the provisions of S. 18 of the Limitation Act in making an application for setting aside the sale. 1924 P. 496=80 I.C. 761.

Minority.—The period of limitation is extended on the ground of minority under S. 7 of the Limitation Act. 9 A. 411. An application under O. 21, r. 90, presented on behalf of a minor by his next friend or guardian after the expiry of one year from the date of sale is not barred by limitation. S. 7 of the Limitation Act applies to such cases and the period is extended. 5 P.L.R. 1910=5 I.C. 488.

WAIVER.—A party who does not raise any objection to the proclamation which he ought to have raised, is estopped from complaining of any irregularity resulting from an erroneous statement which he should have corrected. 38 M. 387 ; 47 I.C. 831 ; 32 I.C. 990. When the judgment-debtor, on whom notice had been served, did not appear on the date fixed for settlement of the terms of the proclamation of sale of several items of property ordered to be sold, *held* that it was not open to him subsequently to raise an objection to the sale proclamation, 22 I.C. 780. A waiver by the applicant is bar to the setting aside of the sale. "It would be very difficult indeed to conduct proceedings in execution of decrees by attachment and sale of property, if the judgment-debtors would lie by, and afterwards take advantage of any misdescription of the property attached and about to be sold which they knew, well, but of which the execution creditor or decree-holder might be perfectly ignorant, that they should take no notice of that allow the sale to proceed and then come forward and say that the whole proceedings were

vitiated". 12 M. 19 P.C. ; 32 A. 230 ; 38 M. 387 ; 28 A. 273 ; 29 O. 577 ; 32 I.C. 990. A petition by the judgment-debtor paying for a postponement of an execution sale would not amount to an admission that the publication and proclamation of sale were properly made and would be no ground to refuse to hear evidence on the matter when irregularities are alleged by the judgment-debtor in the publication and conduct of the sale. 7 O. 613 ; 17 M. 304. A person cannot be said to be bound by a waiver unless he is aware of what he is waiving, and what rights he is giving up. 1926 O. 577=91 I.C. 407.

APPLICATION BY PURCHASER TO SET ASIDE SALE ON GROUND OF JUDGMENT-DEBTOR HAVING NO SALEABLE INTEREST.—The purchaser at any such sale in execution of a decree may apply to the Court to set aside the sale on the ground that the judgment-debtor had no saleable interest in the property sold. (O. 21, r. 91.)

OBJECT AND SCOPE.—The object of the rule is to enable the Court to relieve a purchaser on the ground that the judgment-debtor had no saleable interest in the property attached. 10 O. 368 ; 37 O. 67 ; 5 A. 577. This rule gives a summary remedy in execution to auction-purchasers when the judgment-debtor had no saleable interest in the property. 78 I.C. 517 ; 61 I.C. 805=13 Bar. L.T. 152. The rule applies whether the decree-holder or a stranger is the purchaser. 61 I.C. 805. This rule does not apply when the judgment-debtor has even a small partial interest in the property sold. 9 O. 626 ; 10 O. 368 ; 27 O. 264 ; 42 I.C. 440 ; 2 C.L.J. 506 ; 28 C. 235 ; 17 M. 228 ; 9 M. 439 ; 10 C.L.J. 492 ; 51 I.C. 593 ; 21 I.C. 774 ; 88 I.C. 493. Where a judgment-debtor is found to have no interest only in one of the two items sold, the rule does not apply. 7 Bar. L.T. 18=33 I.C. 383 ; 23 M.L.J. 108=15 I.C. 109 ; 9 C. 626 ; 27 O. 264=88 I.C. 597. This rule does not apply when the sale is sought to be set aside by a purchaser on the ground that he had been induced by misrepresentation or concealment to buy the property for more than its real value. 10 O. 368 ; 20 C. 8 P.C. ; 19 C.W.N. 1291 ; 28 C. 235 ; 5 Pat. L.T. 41. That there was a mortgage on the property in excess of its value is no ground for setting aside the sale. The fact that the property was fully incumbered was not sufficient to sustain a plea that the person whose property it was had no saleable interest in it under O. 21, r. 91. There is always the right of equity of redemption to the judgment-debtor. 9 A. 167 ; 5 L.B.R. 58 ; 9 O. 506 ; 10 O. 368. (But see 8 C.L.R. 459). A person who purchased immoveable property at a sale in execution of a decree knowing that the judgment-debtor had no saleable interest therein was not entitled to the provisions of S. 313, C.P. Code (corresponding to O. 21, r. 91 of the present Code) which were presumably designed for the protection of persons who innocently and ignorantly purchased valueless property. 3 A. 527. This does not seem to be good law under the present Code. Under O. 21, r. 91 the purchaser may resist the confirmation of sale, while under O. 21, r. 93 he may apply after the confirmation of sale, for the refund of the purchase money. 8 M. 99 ; 9 M. 437. When a decree for foreclosure of a certain mortgaged property is passed and the judgment-debtor was allowed time within which to deposit the money to redeem it the judgment-debtor is considered to have a saleable interest before the expiry of the time during which he could redeem. A.W.N. (1884) 318. When the judgment-debtor has no saleable interest, the remedy of the auction-purchaser is by means of O. 21, r. 91. But if the owner of the property gets a decree declaring his right to the property sold that by itself is tantamount to setting aside the sale and there is no further need of applying under O. 21, r. 91. 1 Pat. L.R. 358=(1923) Pat. 342.

APPLICABILITY.—Bengal Tenancy Act, S. 174.—An auction-purchaser under S. 174 of the above Act is not entitled to apply under O. 21, r. 91, to have the sale set aside on the ground that the judgment-debtor had no saleable interest. 1926 O. 798—94 I.C. 292.

SALEABLE INTEREST.—The interest of an insolvent judgment-debtor after vesting in the Official Assignee is not saleable. 11 O.L.R. 389 ; 9 O. 217. Saleable interest in this rule means saleable interest at the time of the sale. 78 I.C. 279. A mortgagor has a saleable interest in the property even though a decree for the enforcement of the mortgage has been obtained and the amount of the mortgage under the decree may exceed the value of the property. 9 A. 167 ; 9 O. 506. For other cases see S. 60, O. P. Code.

WHICH COURTS TO ENTERTAIN THE APPLICATION.—An application to set aside a sale held by the Collector in execution of a decree transferred to him for execution on the ground that the judgment-debtor had no saleable interest in the property should be made to the Civil Court and not to the Collector. 9 A. 43 ; 11 A. 94.

NECESSARY PARTIES.—The decree-holder is a necessary party to an application under this rule. 18 B. 594. A person alleged, to be real purchaser, by the auction-purchaser is not a necessary party. 24 I.C. 44=1 L.W. 412. Persons who have obtained an order for rateable distribution are necessary parties. (1918) M.W.N. 716. The judgment-debtor is a necessary party and a notice must be given to him or his representative. 7 E. 424.

WHO CAN APPLY UNDER O. 2, R. 91.—Executor of a deceased judgment-debtor.—Where the purchase at the auction sale is made by the executor of the deceased judgment-debtor in his personal capacity he should not be deprived of applying under O. 21, r. 91. 28 I.C. 898=19 O.W.N. 152. When the property is attached by a creditor and in the meantime before sale, it is attached and sold by another decree-holder of the same judgment-debtor, and afterwards it is sold in the execution of the decree of the first attaching creditor the purchaser under the latter sale has a right to apply under O. 21, r. 91. 6 C.L.R. 85. When property, vested in the Official Assignee, is attached and sold in execution of a decree against an insolvent the purchaser is entitled to have the sale set aside in spite of the acquiescence of the Official Assignee in the sale and his willingness to receive the sale proceeds. 9 O. 217 ; 12 C.L.R. 60 ; 11 O.L.R. 389 ; 31 M. 493. The purchaser of an estate in execution of a decree, after default has been made in paying revenue for it, cannot in the event of a subsequent revenue sale seek to come under O. 21, r. 91. 2 O.L.J. 506. The purchaser alone is competent to apply under this rule. (See the rule).

LIMITATION FOR APPLICATION.—An application under r. 91 is governed by Art. 166 of the Limitation Act and must be brought within 30 days from the date of sale.

ENQUIRY.—The Court should make an inquiry whether the judgment-debtor had no saleable interest at all and the parties must be given an opportunity of being heard. 1880 P.J. 254.

REMEDIES OF A PURCHASER OF A DEFECTIVE TITLE.—In the absence of fraud, the only remedy of a purchaser at a sale in execution of a decree, who finds that the judgment-debtor had no saleable interest in the property is an application to set aside the sale under O. 21, r. 91, O.P. Code. 12 Bur. L.T. 211=52 I.C. 174 ; 18 A. L.J. 905=58 I.C. 105 ; 15 C.W.N. 685=10 I.C. 148 ; 28 C.W.N. 20 ; 50 C. 115 ; 25 O.W.N. 756=63 I.C. 126 ; 4 M.L.J. 274 ; 49 I.C. 359=(1918) M.W.N. 655 ; (1912) M.W.N. 1130 ; 14 A.L.J. 1216 (*contra* held in 4 L. 354.) The provisions of O. 21, r. 91 are

not exhaustive of the remedies open to an auction-purchaser who after payment of full price is dispossessed by a claimant who succeeds in a suit brought under O. 21, r. 63, in establishing that the judgment-debtor has no saleable interest in the property. The auction-purchaser has a remedy by way of suit to recover his money. See also 74 I.C. 134=1 Pat. L.R. 73; 41 I.C. 924; 35 B. 29; 20 O. 8 P.O.; 19 O.W.N. 1291; 10 O. 368 28 A. 295; 29 C. 370; 29 M.L.J. 467; 8 M. 101, where it is held that a suit lies. The purchaser may sue and follow his money in the hands of a person who has got it under S. 73, C.P. Code. 13 A. 383. It has been recently held by the High Courts of Lahore and Patna that a suit by an auction-purchaser for refund of the purchase money on the ground of judgment-debtor having no saleable interest in the property sold, is not maintainable. 6 L. 293; 88 I.C. 219=6 Pat. L.T. 769. The auction-purchaser must be deemed to have purchased the property with all risks and all defects in the judgment-debtor's title except as provided in O. 21, r. 91. In the absence of fraud his only remedy is to receive the money under O. 21, r. 91. 27 A. 537; 23 A. 355; 74 I.C. 134=1 Pat. L.R. 73. There is no implied warranty of title in an auction sale except so far as is recognised by the C.P. Code. 42 I.C. 453; 52 I.C. 174=12 Bur. L.T. 211; 33 I.C. 1003=3 Bur. L.T. 169; 36 O. 323.

Fraud.—If an auction-purchaser purchases the property the title as to which is defective, and if he has been misled on account of any fraud or omission on the part of the decree-holder, it is open to him to seek his remedy against the decree-holder by a suit for damages. 2 Pat. L.J. 516=46 I.C. 614; 4 N.L.J. 274. In case of fraud the execution purchaser has a right to have the sale set aside. 20 O. 8 P.O.; 19 O.W.N. 1291=21 I.C. 774. There is no provision in the C.P. Code to bar a suit by the auction-purchaser to set aside the execution sale on the ground that he was misled by the sale proclamation which did not show any incumbrance on the property and that subsequently to the proclamation it was discovered that the incumbrances on the property exceeded its value. The suit is maintainable on the principle of equity, justice and good conscience, although fraud was not specifically alleged in the plaint, an inference of fraud having been suggested therein. 19 A.L.J. 530=63 I.C. 425. When a sale is set aside on the ground of fraud, the purchaser is entitled to the purchase money, if he is not a party to the fraud. 1 A. 568. A purchaser at a Court sale has no remedy provided by C. P. Code for having a sale set aside on the ground that he was led into a mistake as to the extent of the property sold. But if he was induced by fraud to pay a larger sum for the property than he would have had to pay if he had not been so deceived, he has a remedy by a separate suit to set aside the sale. 20 O. 8 P.O.; 24 O. 682; 1 C.W.N. 652.

SETTING ASIDE SALES ON OTHER GROUNDS.

An executing court may set aside a sale on any ground not falling within O. 21, r. 90, C. P. Code, on an application under S. 47 and no separate suit will lie for the purpose. 30 M.L.J. 611=34 I.C. 829; 27 M.L.J. 605=26 I.C. 46. Where a judgment-debtor had been adjudged an insolvent and after his property had vested in the official receiver a portion thereof was sold in execution of a decree obtained before adjudication in spite of the receiver's objections, held that the sale was altogether irregular, and that the Court in holding the sale after it had been brought to its notice that the judgment-debtor had been adjudged an insolvent acted, if not without jurisdiction, at any rate with material irregularity in the exercise of its jurisdiction. 30 M.L.J. 611=34 I.C. 829. An execution sale may be set aside when carried out against a dead person. 18 C.W.N. 1266.

WHEN EXECUTION WAS TIME-BARRIED.—No application to set aside a sale held in execution of a decree on the ground that the application for attachment and sale was barred by limitation can be made after confirmation of sale. 2 Pat. L.J. 157=38 I.C. 876. When an appeal is preferred by one of the auction-purchasers of an execution sale and the

appellate Court reverses the order of the first Court setting aside the sale, the order of the first Court does not stand good even against the other auction-purchasers who do not appeal. 32 I.O. 193.

WHEN THE ORDER SETTING ASIDE A SALE AGAINST AN AUCTION-PURCHASER IS SET ASIDE.—When an appeal is preferred by one of the auction-purchasers at an execution sale, and the appellate Court reverses the order of the first Court setting aside the sale, the order of the first Court does not stand good even as against the other auction-purchasers who do not appeal. 32 I.O. 193.

WHEN THE DECREE IS SET ASIDE.—When a decree is set aside, a sale of the property in execution of that decree shall itself be set aside as having been no longer based on any solid foundation. 43 B. 295. A sale in execution of a decree that is satisfied and is not subsisting is void and liable to be set aside. 9 I.O. 452=14 Bur. L.T. 12. A mortgagor judgment-debtor is not entitled to redeem when the property mortgaged has been purchased by a third party at a sale in execution of an *ex parte* decree notwithstanding the fact of the decree being set aside and subsequently re-affirmed after trial. 26 O. 734. When at the time of auction sale there is a valid decree, the sale is perfectly valid and a subsequent amendment or setting aside the decree does not necessarily nullify the sale. 1925 A. 264=85 I.O. 660 ; L.R. 6 A. 580.

SALES IN EXECUTION OF FRAUDULENT DECREES.—Such a sale cannot be set aside without setting aside the decree. Consequently when the right to have the decree set aside as fraudulent has become barred by limitation, no decree can be made setting aside the sale only, as made in execution of a fraudulent decree. 20 O.W.N. 659=33 O. 767. A suit is maintainable for setting aside the decree and the sale thereunder on the ground that the decree was obtained by fraud. 21 C. 605 ; 24 O. 546 ; 3 C.W.N. 670 ; 5 C.W.N. 559 ; 27 O. 197 ; 3 O.L.R. 17 ; 11 O. 509.

SETTING ASIDE SALES BY STRANGERS.—When a person seeks to set aside a sale by reason of a title adverse to that of the judgment-debtor (by survivorship) at the date of attachment, his proper remedy is by way of a regular suit. 16 M. 476 ; 15 C. 488. It would not be necessary for an owner of property which is sold in execution of a decree against another person to reverse the sale before recovering possession. He is not precluded from recovering possession by means of his suit merely because he had asked therein for the reversal of the sale. 6 W.R. 47.

SETTING ASIDE SALE TO REMOVE AN INCUMBRANCE.—When a property is sold subject to an incumbrance, the decree-holder is not entitled to have the sale set aside by a regular suit and to have a re-sale of the property ordered free from the alleged incumbrance. The proper remedy for the decree-holder is to bring a suit for a declaration that the alleged incumbrance is null and void and to have the sale stayed till the determination of that suit. If the incumbrance did not exist, the decree holder would have a remedy against the incumbrancer in the form of an action for slander of title. A decree-holder cannot sell a property twice over on his own application when there has been no irregularity in publishing or conducting it and no default committed on the part of the purchaser. 22 B. 759.

NON-RECOVERY OF DEFICIENCY AT A RE-SALE AND SALE OF OTHER PROPERTY.—A sale of other property of the judgment-debtor cannot be set aside on the ground that the deficiency of price fetched at a re-sale was not recovered and the judgment-debtor acquiesced in the cancelment of the sale and did not apply under O. 21, r. 71. 8 O. 291.

COMPROMISE BETWEEN THE JUDGMENT-DEBTOR AND THE DECREE-HOLDER.—The auction-purchaser is not bound by the compromise between the

decree-holder and the judgment-debtor to set aside the sale and the sale therefore cannot be set aside. 15 O.W.N. 685=10 I.C. 148. Where before the confirmation of sale in execution of a decree, the decree-holder is paid the amount of the decree and both the parties agree that the sale should be set aside, the Court may treat the sale as being of no effect, and *may decline to confirm* it notwithstanding the absence of any provisions in O. 21, r. 89 or 90, etc., for so doing. 27 I.C. 661; 47 I.C. 885=16 A.L.J. 750. A sale in execution cannot be set aside by a compromise between some of the parties to the proceedings in which sale took place in the absence of others. 85 I.C. 529; 88 I.C. 534=1925 O. 693.

SETTING ASIDE SALE UNDER O. 21, R. 72.—Where a decree-holder purchases, by himself or through another person without such permission, the Court may, if it thinks fit, on the application of the judgment-debtor or any other person whose interests are affected by the sale, by order set aside the sale, and the cost of such application or order and any deficiency of price which may happen on the re-sale and all expenses attending it, shall be paid by the decree-holder. [O. 21, r. 73, (3).]

A purchase by the decree-holder without permission does not *ipso facto* invalidate the sale. 14 W.R. 405. For other cases see *supra* under the heading "Purchase by the decree-holder without permission".

WHO CAN APPLY TO SET ASIDE A SALE.—Persons entitled to rateable distribution in the assets realised by the sale are entitled to apply. 13 M.L.J. 231. The sons of the judgment-debtor who were no parties to the suit cannot so apply. 13 M.L.J. 231. A person who has got a decree against the judgment-debtor and whose decree is awaiting execution at the hands of the Collector against the judgment-debtor is a person interested in the sale under O. 21, r. 72. A.W.N. (1887) 214.

GROUND FOR SETTING ASIDE SALES.—The mere inadequacy of price at a sale is not a sufficient ground for setting aside a sale under this rule. The inadequacy of price must be occasioned by some irregularity. 21 L.W. 521=6 Pat. L.T. 859.

INHERENT POWER OF THE COURT TO SET ASIDE SALES.—O. 21, rr. 89 and 90, being inapplicable in certain cases of setting aside sales under the inherent powers of the Court, Art. 166 of the Limitation Act does not apply in such cases. But following the analogy of these rules and Art. 166, the Court should not exercise its inherent powers when there is no substantial injury or the party has been found guilty of laches by not applying within 30 days as required by Art. 166. 27 M.L.J. 605=26 I.C. 46.

SETTING ASIDE SALES OF MOVEABLE PROPERTY.—No irregularity in publishing or conducting the sale of moveable property shall vitiate the sale but any person sustaining any injury by reason of such irregularity at the hands of any other

person may institute a suit against him for compensation or (if such other person is the purchaser) for the recovery of specific property and for compensation in default of such recovery. (O. 21, r. 78.)

SCOPE.—Though O. 21, r. 78, allows a judgment-debtor to sue for compensation for injury caused to him by an irregularity in conducting or publishing the sale of moveable property, it must be read with S. 47 which bars a separate suit between the parties to execution. 14 P.R. 1886; 2 P.R. 1899; 162 P.R. 1889. Sales of moveable property in execution confirmed by a Court cannot be set aside on application of decree-holder or judgment-debtor. 12 P.R. 1919. A suit will lie to set aside a sale of moveable property. 2 B. 258. A sale of a moveable property of one person in execution of a decree against another is liable to be set aside by a regular suit. 9 W.R. 118. When goods offered for sale whether in execution or privately are described as of a particular denomination and every circumstance points to the buyer having contracted for the specific goods produced as described, but the goods tendered do not answer that description, the purchaser is entitled to reject them and if he had paid for them to recover the price as money had and received for his use. 54 I.C. 315.

IRREGULARITIES.—An omission by the Court to give notice at the time of sale of the amount of the decree for which the property is to be sold does not constitute an irregularity entitling the plaintiff to sue under the provisions of the rule. 2 W.R. 60. An omission to serve notice of the sale on the judgment-debtor in person or in the village in which he lives is not an irregularity under this rule. 6 W.R. Civ. Ref. 14. Overstating the balance due does not constitute an irregularity. 1 N.W.P. 61. Neglecting to sell the properties of the deceased judgment-debtor in the hands of his widow and representatives in the first instance, before proceeding to sell her private property in execution and the neglecting to give her a proper notice are irregularities under this rule. 3 W.R. 123.

INVALID SALES.

A sale cannot be treated as a nullity merely because it is irregular or illegal. 25 B. 337 P.O.; 27 M. 504; 1 S.L.R. 98; U.B.R. 1907, 2nd Qr., C.P. Code 311; 25 A. 214 F.B.; 26 A. 152; 25 A. 347; 26 A. 57; 26 A. 522; 9 C.W.N. 1015 F.B.; 33 C. 352 F.B.; 12 C.W.N. 590; 35 C. 61 F.B.; 34 C. 811.

Invalid and Irregular sales.—If a party can waive an objection to the sale it amounts to an irregularity. It is not a nullity. An irregularity is a deviation from a rule of law which does not take away the foundation or authority for the proceeding, whereas a nullity is a proceeding that is taken without any foundation or is so essentially defective as to be of no avail or effect. 27 C.W.N. 765=37 C.L.J. 447. Failure to object to a void sale does not make the confirmation thereof conclusive. 2 C.L.J. 334. In the case of irregularities under O. 21, r. 90, substantial injury must be proved but in the case of invalid sales no such loss is to be proved. 25 B. 337; 12 A. 510; 26 M.L.J. 275. The doing of a thing by the Court which is prohibited by law is an illegality which renders the thing done null and void, and the omission to do something which is prescribed may be only an irregularity. 12 A. 510. But there is no sound basis for making a distinction between a material irregularity and an illegality in the conduct of the sale. 5 M.L.J. 70.

A sale of properties which are in the hands of a receiver appointed in a particular suit to which the judgment-debtor is a party, without the leave of the Court by which the receiver was appointed is an irregularity. It is not void. 40 C.L.J. 78=84 I.C. 471.

A sale which is bad on the ground of irregularity or fraud and thus liable to be set aside is voidable only and an application to set it aside must be made within 30 days. 60 I.C. 529=3 U.P.L.R. (Pat.) 27.

Decree without Jurisdiction.—Where a Court has no jurisdiction to make a decree, then any sale which takes place under such a decree is null and void. 15 W.R. 11.

Sale of property without the Jurisdiction of the Court.—When a Court sells immovable property entirely outside its jurisdiction, the sale is a nullity. 27 O.W.N. 542=1923 C. 619 ; ; 3 A. 382 ; 12 A. 96 ; 23 W.R. 1 ; 4 A. 359 ; 5 A. 15 ; 6 N.W.P. 354 ; 4 N.W.P. 135. A sale of immovable property in execution of a decree, which property is situate beyond the jurisdiction of the Court making the decree, will not be good unless it has been made in strict observance of the procedure and in such cases attachment is not deemed to be sufficient to support the subsequent sale. 8 W.R. 310 ; 9 W.R. 388. When a sale is without jurisdiction, it is a nullity and might be disregarded without any proceeding to set it aside. 32 C. 296. If a Court ordering a sale in execution of a decree has jurisdiction an auction-purchaser is not bound with correctness of the decree upon which execution has issued. 14 C. 18.

If the formalities laid down in the C. P. Code as preliminary to a valid sale have not been complied with, the sale is not *de facto* void. 40 P.R. 1910.

When the property is released from attachment.—When an order for attachment and sale of a house in execution of a decree was set aside and the house was released from attachment but the sale was actually held before the order of the release of the property reached the officer conducting the sale, the sale was held to be illegal. 20 N.L.R. 168.

Fraud.—Though a decree is fraudulently obtained, the execution sale under it is not rendered void unless the auction-purchaser was a party to the fraud in the execution proceedings which vitiate the sale. 62 I.C. 594 (P.). A sale in execution of a decree passed without jurisdiction is a nullity. 6 B.L.R. App. 90. A sale in contravention of the provisions of the T. P. Act is invalid or void. 33 C. 283 ; 22 M. 34.

When the property is not transferable.—When the property is not at all saleable in execution of the decree, the executing Court has no jurisdiction whatever to sell it and the sale is a mere nullity and does not in any sense pass title to the decree-holder as purchaser. 46 A. 153.

As soon as an *ex parte* decree is set aside, the execution sale held thereunder falls through if the purchaser is the decree-holder and a fresh decree subsequently made cannot validate the sale. 22 O.L.J. 403=20 O.W.N. 667=31 I.C. 896.

Sale when the execution is barred.—A sale in execution of a decree is vitiated by the circumstance of the decree being at the time of sale invalid, *i.e.*, barred by limitation. 5 B.L.R. 68=13 W.R. 273 ; 20 W.R. 5 ; 5 N.W.P. 242.

Sale when decree satisfied.—When through inadvertance or otherwise the Court orders sale of any property in execution of a decree notwithstanding a previous satisfaction or discharge of the same the sale under such orders would be null and void as *ultra vires* as the Court can have no jurisdiction to order sale of property in such proceedings. 16 A. 5. When a person purchased *bona fide* and for value, the property in execution of a decree, by a competent Court the sale is a good one, and the fact of satisfaction or compromise of the decree cannot have the effect of setting it aside. 15 O. 557.

Sale in contravention of an order of the Court.—When a sale is held in contravention of an order of the Court which it is competent to make, the sale is invalid. The sale of an entire property when ordered to be sold with the consent of the decree-holder is in contravention of the order and is invalid and liable to be set aside. 10 M.L.J. 211. If a Court has jurisdiction to sell a property, the auction-purchaser is not bound to inquire into the validity of the order of sale. 22 A. 377 ; 14 C. 18 ; 15 C. 557 ; 19 M. 219 ; 25 B. 337.

Sale by Court instead of by Collector.—A sale by a Court of ancestral land which under rules should be held by a Collector, is invalid and may be set aside. 4 A. 382 ; 2 A.L.J. 448 (not followed in 28 A. 273).

Sale of a stranger's property.—Attachment and sale of one person's property in execution of a decree against another is illegal and void and the purchaser gets no title. 34 A. 223 P.O.

A sale held by a Court to recover Court-fees wrongly believed to be due to the Crown while they were not actually due is invalid, as the order for such sale is *ultra vires*. 15 A. 324 ; 16 A. 5 ; 19 A. 308 ; 163 P.L.R. 1901 ; 26 A. 346 ; 12 O. 307.

Sale without a legal representative of the deceased judgment-debtor on record.—When in execution of a mortgage decree, the mortgagee who had notice of the death of the judgment-debtor, without bringing on record the legal representatives, brought the property to sale, and purchased it himself, it was held that the sale was a nullity against the representatives of the judgment-debtor. 23 I.C. 251=26 M.L.J. 267.

Sale voidable at the option of the Official Liquidator.—S. 171 of the Companies Act provides that when a winding-up order has been made, no suit or other legal proceedings shall be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court may impose. The discretion to grant such permission vests in the Court which passed the winding-up order. A sale held in execution by a Court other than that which passed the winding up order without the permission of the latter Court is voidable at the instance of the Official Liquidator and absence of the knowledge of the order of the winding-up, cannot affect the applicability of S. 171. 38 I.C. 91=1917 P. 315.

LIABILITY OF DECREE-HOLDER.—The decree-holder who has caused the sale of immoveable property not belonging to the judgment-debtor, though he has done so in perfect good faith is liable to make good the value of that property to the rightful owner. 14 W.R. 120. There is no necessity of proving *mala fides* on the part of the judgment-creditor to make him liable for damages to the owner of the property. 5 N.W.P. 211. The purchaser may have a relief against the judgment-creditor who has received the purchase money. 3 C. 806 ; 17 M. 226. If the goods sold do not belong to the judgment-debtor, the litigation and delay and consequent depreciation of the goods follow from the unlawful act of the decree-holder for which he is responsible. 17 C. 436 ; 3 B. 74 ; 5 I.A. 116.

LIABILITY OF SHERIFF.—The sheriff is authorised by a writ of *fiere facias* to seize the property of the judgment-debtor which lies within his territorial jurisdiction and to pass the debtor's title to it without awaiting that title to be good. If however the sheriff acts *ultra vires* by seizing and selling property without his jurisdiction, he cannot invoke the protection of the law given to him when acting without jurisdiction and is in no better position than an ordinary person who sells what he had no right to sell. The sheriff's responsibility in respect of sales in India must be governed by the law relating to the sales of chattels rather than to that of real estate. 3 C. 806.

LIABILITY OF THE AUCTION-PURCHASER.—When moveable property of a stranger is sold in execution as that of the judgment-debtor the former can bring a suit against the auction-purchaser for the restitution of the specific property or for its value. The fact that the real owner may have a remedy by a suit for damages against the creditor for causing the property to be attached and sold is no reason why he should be debarred from bringing a suit of this nature. 82 P.R. 1878.

VIII.—RIGHTS AND LIABILITIES OF THE AUCTION-PURCHASERS.

Sales in execution and sales *inter partes*. 29 O. 682.

ESTOPPEL AND THE AUCTION-PURCHASER.—A purchaser at an execution sale is bound by the same rule of estoppel as the judgment-debtor whose right and interest he acquires. 10 I.O. 792 ; 8 I.O. 846 ; 29 I.C. 734.

WHEN PROPERTY SOLD IS SUBJECT TO AN ENCUMBRANCE.—When property is sold subject to an encumbrance under O. 21, r. 62, C.P. Code, only the judgment-debtor's right of redemption is sold and the purchaser acquires only the right of redemption and cannot question the validity of the encumbrance. 2 O.L.J. 225 = 30 I.O. 238 ; 47 O. 446. The effect of an order under O. 21, r. 62, directing the continuance of an attachment subject to a mortgage is that the purchaser at an auction sale only buys the judgment-debtor's right of redemption. 12 Bur. L.T. 43 = 51 I.C. 580. When property is sold subject to a charge of the object, the auction-purchaser is entitled to recover the property after the death of the objector when the charge was a right of residence for life. 44 B. 860. When in execution of a decree property is sold subject to a mortgage, an auction-purchaser not being the decree-holder, who purchases the right, title and interest of the judgment-debtor is not entitled to raise any question as to the validity or otherwise of the mortgage. 7 A.L.J. 199 = 5 I.C. 874. Mortgages noted in the proclamation of sale as claims upon the property sold should not necessarily be entered in the certificate of sale or be computed as part of the purchase-money unless they have been admitted by the parties or established by a decree, or unless they have been declared under O. 21, r. 62 of the Code to be charges on the property and the Court has seen it fit to sell it subject to them. 18 B. 175 F.B. A purchaser in execution of a mortgage decree acquires the interest of the mortgagor to the extent of the mortgage and such rights as the mortgagors had at the time of sale and when the mortgagors had *bona fide* in due course of management given leases of property after the decree, the purchaser takes the property only subject to mere subsisting leases specially when they were registered transactions. 9 A.L.J. 759 = 10 I.O. 102. But where the purchaser merely buys an estate which is under a mortgage, but does not take it subject to the incumbrance or does not undertake to discharge it, he is not precluded from impeaching the validity of the mortgage. The distinction between this class of sales and that mentioned above depends upon the question whether the property has been sold subject to the mortgage, or whether mere notice of the mortgage has been given in the proclamation of sale, the former contingency is provided by O. 21, r. 62, and the latter is contemplated by O. 21, r. 66. 47 O. 446 ; 2 O.L.J. 140 ; 3 O.L.J. 422 = 36 I.C. 732 ; 18 I.O. 461 ; 2 U. P.L.R. 94 = 55 I.O. 354 ; 28 I.C. 360. The auction-purchaser is not precluded from resisting a suit on a mortgage upheld at the time of sale on the ground that nothing is done under it. 4 N.L.J. 149. A purchaser at an execution sale cannot avoid his purchase, merely because charges not entered in the sale proclamation are found to be enforceable against the property, nor is such a purchaser bound by the existence or validity of charges merely because they are entered in the sale statement. 10 O.O. 252. A sale proclamation after proceedings under O. 21, r. 66, is not conclusive between the parties as binding on the auction-

purchaser who can contest the validity of the mortgage notified in the proclamation, 48 A. 489. An auction-purchaser is not estopped from impugning a mortgage notified at the time of sale, 35 A. 257 ; 33 B. 311 ; 28 I.O. 360=2 O.L.J. 140 ; 19 N.L.R. 15=1923 N. 282 ; 6 N.L.R. 28 ; 6 N.L.R. 217=72 I.O. 461. An auction-purchaser purchases the interests of the mortgagor as they existed on the date of the mortgage and the rights of the decree-holder *qua* the property sold as they existed at the date of the sale. 16 O.C. 148=20 I.O. 458 ; 6 B. 490, 495 ; 62 P.R. 1908 ; 13 A. 28. Where under O.21, r. 66, a mortgage-deed is merely notified, that notification is no way conclusive as between the decree-holder or the purchaser on the one hand and in the holder of the incumbrance on the other, as to its validity. When the sale is not effected subject to a mortgage but the mortgage is simply notified at the time of the sale, the auction-purchaser is not estopped from questioning the validity of the mortgage. 20 A.L.J. 722=66 I.C. 790. A judicial sale transfers to the purchaser property of the judgment-debtor against the debtor's will and places the purchaser in a higher position than that in which the judgment-debtor could place him in a private sale. He can impeach any charge on the property as fraudulent and collusive and therefore void. 2 N.W.P. 38. Where a person who has a lien on property which is attached and proclaimed for sale informs intending bidders of such lien, the purchaser who purchases in spite of the warning is subject to the lien. 4 Bur. L.T. 142=12 I.C. 855 ; 1 W.R. Mis. 8 ; 24 W. R. 348. An auction-purchaser of a property mortgaged to a person under a registered deed executed prior to the attachment of the property is bound by the mortgage even when the mortgagee failed to have his lien notified at the time of the sale. 45 I.C. 877=5 O.L.J. 114. The purchaser of an equity of redemption stands in the shoes of the mortgagor by virtue of his purchase and cannot therefore be allowed to be in a better position than the mortgagor himself. 15 O.O. 211=15 I.O. 5. An auction-purchaser in execution of a money decree derives his title from the judgment-debtor, and not from the decree-holder. 43 I.C. 907=15 N.L.R. 48. A decree-holder who himself purchases his judgment-debtor's property at the execution sale during the pendency of a suit by the mortgagee of the same property gets only the right and interest of the mortgagor in such property, *viz.*, the equity of redemption, and does not acquire the property free from the encumbrance created by the debtor. 4 O. 789 ; (21 W.R. 349 followed). The title of the auction-purchaser is not defeated by any transfer made by the judgment-debtor between the date of the sale, and the date of the confirmation of sale. 8 I.C. 657 (2 O.W.N. 589 ; 7 O.L.J. 1, followed). When a holding is sold in execution of a decree for cess, the purchaser obtains only the right, title and interest of the tenant. The purchaser does not hold the property free from incumbrances created by the tenant prior to the sale. 3 Pat. L.T. 282=65 I.C. 138. The purchaser of the rights of the mortgagor in the mortgaged property, purchases merely the mortgagor's right to redeem. 9 W.R. 243 ; 10 O. 567 ; 14 W.R. 223 ; 10 W.R. 384. An auction-purchaser takes the property subject to the lien on it. 23 W.R. 196. The purchaser must redeem all charges created before the sale. He must be held to have made his bid with full knowledge that the property was burdened with debts and he can claim possession by paying off those debts. 3 Bom. L.R. 92. An auction-purchaser's title to avoid an under-tenure depends on whether the tenure is protected by the sale and whether the tenant has a right of occupancy. 12 W.R. 123. Where in execution of a decree, the bare equity of redemption of the judgment-debtor in certain properties was sold, but the purchaser failed to take symbolical delivery, *held* that it did not matter and the fact that over 12 years elapsed from the date of sale would not revert the property to the judgment-debtor. 28 M.L.J. 256=26 I.C. 528. If a mortgage notified in the proclamation of sale turns out to be invalid, the benefit is taken by the purchaser and the judgment-debtor is not entitled to claim from him a refund of the amount, alleged to have been due on the mortgage. The purchaser is free to contest the reality or validity of the mortgage in a suit by the mortgagee. 31 A. 583 ; 25 O.W.N. 942. When a

property is sold subject to a mortgage in execution of a decree, the purchaser may resist the claim on the ground that nothing is due on the mortgage, and the mortgagee is bound to show that the amount claimed by him is really due notwithstanding that an order was made in his favour under O. 21. r. 62, because the auction-purchaser was not a party to the execution proceedings. 7 C.P.L.R. 73; 28 A. 418; 13 Bom. L.R. 307; 9 B. 285. 15 B. 290. When a person sets up a title as mortgagee of certain property attached in execution of a decree and the Court directs that the mortgage be notified the purchaser at the execution sale can contest the validity of the mortgage. He is not bound to see to set aside the mortgage. 55 I.O. 354=2 U.P.L.R. 94. When a property is sold subject to a mortgage lien of A, the order of the Court would be conclusive only if it was proved that he (the purchaser) was aware of the fraud within a year of the date of order and being so aware did not take steps to establish his rights within the period prescribed by Art. 11 of the Limitation Act. 16 Bom. L.R. 648=27 I.O. 298. Where at the time of sale there was no direction that the property was to be sold subject to a mortgage the auction-purchaser is not obliged to discharge the incumbrance if it appeared that the document did not create any charge on the property. 18 I.O. 461. A decree based upon a colourable mortgage does not affect the right of a subsequent *bona fide* purchaser for value of the property mortgaged. A fictitious mortgage does not diminish the right of the purchaser in the property of the judgment-debtor. 3 B. 30; 6 B. 703; 10 B. 659; 11 B. 708; 19 B. 86. By agreeing to purchase the property burdened with the liens notified in the proclamation of sale an auction-purchaser undertakes to pay them all if they are proved to be valid and enforceable. 3 O.L.J. 422=36 I.O. 792. A purchaser at an execution sale of an equity of redemption is entitled to plead that the stipulation as to interest is harsh and unconscionable. 8 A.L.J. 407; 10 I.O. 14. An auction-purchaser of the equity of redemption acquires the right, title and interest of the judgment-debtor and nothing more. If the judgment-debtor was one of the three mortgagees the auction-purchaser would step into his shoes and have all rights as one of the three mortgagees. 70 I.O. 530=1928 R. 119. The purchaser in execution of a money decree is equally bound as the judgment-debtor by the terms of the mortgage on the property, inasmuch as the right, title and interest of the judgment-debtor passes to him, and when the judgment-debtor would himself be estopped from denying liability under the mortgage on account of his conduct in the mortgage transaction the purchaser is equally barred from contesting his liability. 35 O. 877. A stranger *bona fide* purchaser at sale in execution of a money decree obtained by the mortgagee obtains a good title free from the mortgage lien unless the sale is subject to it. 23 B. 119. Where an intervenor, as a party to a suit has a lien, on a house, which is anterior to the sale under which the plaintiff purchased it, the plaintiff cannot maintain a suit for rent against the tenant. 14 W.R. 77. When the rights of landlord and tenant respecting abatement of rent had been settled by a compromise decree, an auction-purchaser of the tenure at a sale for arrears of rent is bound by the same. 35 C.L.J. 292=69 I.O. 126. A purchaser at the Court sale of attached property believed to be encumbered is bound by estoppel which would be binding on the judgment-debtor with certain exceptions of fraud or collusion, etc. 33 B. 311. If a person having a lien on property attached and proclaimed for sale informs intending purchasers of such lien, the purchase is subject to the lien. 12 I.O. 855=4 Bur. L.T. 142.

Mortgage in favour of the decree holder.—Where in an application for execution of a money decree, the decree-holder mentions that the property was subject to a mortgage held by him, but the sale proclamation omits it, and such omission is not due to fraud, misrepresentation, collusion or misconduct, the decree-holder is not estopped from putting forward and enforcing his mortgage against the auction-purchaser. 19 A.L.J. 744. The mortgagee having attached the mortgaged property in execution of a money

decree against the mortgagor and having himself purchased the property at the sale in execution of the decree without obtaining the leave of the Court to bid at the auction had not thereby freed himself from the liability to be redeemed by the mortgagor. 22 B. 624 (followed in 62 P.R. 1908; 32 M. 242; 23 M. 377; 4 A.L.J. 787; dissented from in 30 M. 362; not followed in 27 A. 517.) Where a decree-holder brings properties to sale in execution of his decree without disclosing the existence of a prior mortgage in his own favour, he is estopped from setting up the mortgage thereafter as against the auction-purchaser. L.R. 4 A. 353 (Rev.); 24 W.R. 263; 40 C. 143; 16 I.C. 355; 4 U. B.R. (1921) 62-64 I.C. 953; 10 C. 609; 22 B. 686; 5 C.W.N. 497; 14 C.P.L.R. 17; 15 M. 412; 11 O.C. 206. Where a maliki right which has been sold under a decree has not been pledged or mortgaged the purchaser is entitled to get possession in spite of a deed of assignment executed by the previous owner directing the ryot to make certain annual payment to a creditor of his for interest due under a bond. 22 W.R. 445; 3 O. 720. The mortgagee-decree-holder auction-purchaser purchasing the mortgaged property at Court auction having obtained permission to bid under O. 21, r. 72 is in the same position as an independent purchaser and is only bound to give credit to the mortgage for the amount of his bid. 19 O. 4. When the purchaser in execution of a mortgage decree is the mortgagee himself he is deemed to have notice of the charges to which the property is subject and he cannot complain that it fixed the rate of raiyati holding created by kabuliat providing monthly instalments for payment of rent and heavy interest on arrears. 48 C. 93. When prior to the sale in execution of his mortgage decree, a mortgagee purchases the equity of redemption in the mortgaged property in the name of a benamidar, his subsequent purchase of the property at a sale held in execution of his mortgage decree can pass no title to him. 32 C. 198 P.C. Where two persons have charges on a property on equal priority the first who takes out execution is entitled to satisfy his decree by sale of the property and the other person loses his right to proceed against that property. 16 C.W.N. 701=14 I.C. 568.

Liability for rent.—Where a mortgagee purchases a holding at a sale in execution of a mortgage decree he must be taken to have known the nature of the holding on which he had advanced money and the terms of the contract on which that tenancy had been created. Where the holding purchased is that of a raiyat at fixed rates created by a kabuliat containing stipulations for the payment of rent by monthly instalments and for interest at a very high rate on arrears the purchaser and his successor in interest are bound to pay interest at the rate and pay rent in accordance with the instalments provided for in the kabuliat. 57 I.C. 1004. A landlord obtained a decree against his tenant for rent in 1906 and one for money in 1909. In execution of the rent decree, he attached the tenure in respect of which he had obtained a decree. At the instance of the decree-holder it was proclaimed at the time of sale that the tenure in question was subject to a debt under the decree of 1909. The decree-holder purchased the tenure. *Held* that the judgment-debt in respect of the rent decree must be deemed to have been extinguished and that the landlord was not entitled to execute the decree. 18 C.L.J. 29=16 I.C. 355.

A suit for a declaration of right.—The auction-purchaser of property in execution of a money decree is not bound either to tender the mortgage money or to offer to redeem or to frame the suit as one for redemption, and his not having done so does not deprive him of his right to the declaration sought by him. 18 A. 320.

MORTGAGE OF MOVEABLE PROPERTY.—The mortgagee of moveable property cannot follow the property in the hands of the auction-purchaser. 1925 R. 303=4 Bur. L.J. 195.

PLEDGE.—The purchaser in execution of a decree, of the rights pledged for the debt for which the decree was obtained is not bound by any encumbrances made by the original proprietor subsequent to the pledge. W.R. 1864 Mis. 959.

DOCUMENTS OF THE JUDGMENT-DEBTOR.—The purchaser in Court auction of defendant's interests in a certain property is not bound by findings of Court as to genuineness of documents in a suit to which the defendant but not the purchaser was a party. 8 I.C. 846=9 M.L.T. 207.

RIGHTS UNDER BENAMI PURCHASES.

SUIT AGAINST PURCHASER NOT MAINTAINABLE ON GROUND OF PURCHASE BEING ON BEHALF OF PLAINTIFF.—(1) No suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed, on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims.

(2) Nothing in this section shall bar a suit to obtain a declaration that the name of any purchaser certified as aforesaid was inserted in the certificate fraudulently or without the consent of the real purchaser or interfere with the right of a third person to proceed against that property, though ostensibly sold to the certified purchaser on the ground that it is liable to satisfy a claim of such third person against the real owner. (S. 66.)

LEGAL CHANGES.—(1) The words "on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims" have been substituted for the words "on behalf of any other person or on behalf of some one through whom such other person claims." (2) The latter part of sub-S. (2) is new. It is intended to give effect to the Calcutta decisions and supersedes the Madras and Allahabad decisions on the point. See notes *infra*.

BENAMI SALES.—When A purchases a certain property with his own money but in the name of B, the purchase is said to be *benami*. B is said to be benamidar or ostensible purchaser and holds the property in trust for A. A is called the real purchaser.

PRIVATE SALE.—If A's object in purchasing the property in B's name is to defraud his creditors and the object of the fraud is carried out, the court will not help A in recovering possession of the property from B. But if the object of the fraud is not carried out, the court will help A in recovering possession of the property from B, notwithstanding A's intention to effect a fraud; and generally B holds the property in trust for A and A can compel B to transfer the property to him. 28 C. 370; 11 B. 708; 31 B. 405; 20 M. 926; 29 M. 72; 31 M. 97; 31 M. 485; 33 C. 967; U.B.R. (1908), 3rd Qr., 1; 3 L.B.R. 245.

EXECUTION SALE.—The law is more strict in the case of court sales. According to S. 66, B will be conclusively deemed to be the real purchaser, and no suit will lie by A against B for possession of the property unless A can prove that B's name was inserted in the certificate fraudulently or without his consent. 23 A. 34 ; 43 O. 20.

OBJECT AND SCOPE.—The object of the section is to put a stop to *benami* purchases at execution sales. 12 B.L.R. 317 ; 21 A. 238 ; 29 I.O. 138 ; 29 I.O. 787 ; 8 M. 511 ; 16 M. 293 ; 40 A. 159 ; 29 A. 557 ; 27 A. 194 ; 78 I.O. 399. The object of the section seems to be to prevent the executing court being led to believe that a person who is not the purchaser is the purchaser. 1923 N. 11. The provisions of this section were designed to create some check on the practice of making what are called *benami* purchases at execution sales for the benefit of the judgment-debtor, and in no way affect the title of persons otherwise beneficially interested in the purchase such as joint decree-holders. 37 A. 545 P.O. ; 50 I.O. 546 ; 29 I.O. 787. This section is intended to put an end to purchases by one person in the name of another. 43 M. 643. This section provides that no suit shall lie against the certified purchaser on the ground that the purchase was made on behalf of the plaintiff. It is only in suits against the certified purchaser as defendant and real purchaser as plaintiff that the former shall be conclusively deemed to be the real purchaser under this section. 2 L.L.J. 353 ; 23 W.R. 853 P.O. ; 3 L.W. 86 ; 1 A. 290 ; 28 O. 370 ; 5 Bom. L.R. 329 ; 27 A. 443 ; 14 M.I.A. 496 ; 9 W.R. 360 ; 21 A. 238 ; 27 A. 194 ; 8 I.O. 258 ; 9 M.L.J. 298 ; 23 A. 34 ; A.W.N. (1900) 190 ; 31 B. 61 (a suit for recovery of part of the property). When the holder of a mortgage decree was refused leave to bid at the execution sale but nevertheless purchased it *benami*, held he could sue to enforce the sale. 10 O. 757 ; 32 M. 242. S. 66 is not restricted to *benami* purchases made by or on behalf of the judgment-debtor. 59 I.O. 719=24 C.W.N. 1024. The section discourages *benami* purchases and does not render them illegal. 14 M.I.A. 496 ; 23 W.R. 353 P.O. ; 11 M. 213 ; 23 O. 699 ; 62 I.O. 720=(1921) Pat. 21. This section applies only when the plaintiff's claim is based on an auction purchase and not when it is independent of and prior to the sale. 36 I.O. 681. S. 66 contemplates a real sale in execution of a real decree in a real suit. It is not applicable to a fictitious sale held in execution of a fictitious decree obtained in a fictitious suit. 18 C.L.J. 616. S. 66 makes a suit founded on the grounds mentioned therein as not maintainable. It does not go further. It has not the effect of excluding evidence as to the auction-purchase being a *benami* for another wherever such evidence is relevant. 84 I.O. 99. S. 66 applies whether the ostensible purchaser at an auction sale is the real purchaser to the extent of the entire or a portion of the property sold. 57 I.O. 684 ; 50 I.O. 335=23 C.W.N. 604 ; 19 C.W.N. 1175. When a mortgagee purchased the property at a sale in execution of his decree *benami* in the name of his wife, he is debarred from bringing a suit. 26 A. 82 F.B. A beneficial owner as defendant is debarred from pleading that the plaintiff is the ostensible owner on his behalf. 11 W.R. F.B. 16 ; 10 W.R. 167. Suits based on grounds other than *benami* are not barred under S. 66. 27 A. 175 ; 35 A. 138 ; 13 M.L.J. 354 ; 16 I.O. 50. If a person purchases property in his own name disregarding the instructions of the decree-holder to bid at the sale for him after obtaining permission from the Court, the purchase is *benami* for the decree-holder whose suit for possession of the property from the certified purchaser is barred under S. 66. 82 I.O. 541. S. 66 applies only when the plaintiff attempts to assert his secret title as against a certified purchaser. 82 I.O. 344.

Part of the property sold.—This section applies whether the ostensible purchaser is the real purchaser to the extent of the entire or only a fraction of the property sold. 57 I.O. 684. Suit for a portion of the property by the beneficial owner against the certified purchaser is barred. 23 A. 34. No such suit as mentioned in S. 66 shall be maintainable and if such a suit is instituted it shall fail. 21 A. 238.

CONSTRUCTION OF THE SECTION.—This section must be construed very strictly. 2 O.W.N. 433; 18 W.R. 157 P.C.; 5 Bom. L.R. 329; 3 O.C. 229; 23 W.R. 358 P.C.; 23 A. 175; 2 A.L.J. 353. A penal section like S. 66 must be construed strictly. 5 O.W.N. 341. The section should not be extended beyond its terms. 54 I.O. 127=24 O.W.N. 51.

RETROSPECTIVE EFFECT.—This section is not applicable to an execution sale when the purchaser's title was perfected under the corresponding S. 317 of the old Code even when the suit is brought after the present Code came into force. 20 O. 950; 58 I.C. 327; 27 O.W.N. 305=70 I.C. 555; 36 C.L.J. 396 (*contra* in 19 A.L.J. 227=43 A. 416). Where an auction-purchase was made by A *benami* in the name of B who subsequently transferred it to C, and after the new Act came into force A sued C for possession on the ground that both the auction-purchase and the transfer to C were *benami* for himself, S. 66 applied and the suit was barred. S. 66 operates retrospectively and a suit cannot be maintained against the transferee of an auction *benami* purchaser, though the transfer took place when the old Code was in force. A right accruing in 1855 before the passing of this Code cannot be taken away by S. 66 when a suit is brought after the enforcement of the present Code. 29 I.C. 716.

TIME FOR TAKING THE PLEA UNDER S. 66.—If the law prohibits the institution of certain suits, effect must be given at any stage of a suit, to the plea that the suit falls within such prohibition. Thus a plea to the effect that a suit is barred by the provisions of S. 66, C.P. Code, can be raised for the first time in appeal. 37 I.C. 111=3 O.L.J. 508.

APPLICABILITY.—By virtue of sub S. (2) of S. 19 of the Public Demands Recovery Act, 1895, as amended by Act I of 1897, the provisions of S. 66 apply to the case of a purchaser at a sale in enforcement and execution of a certificate issued under the said Act and a suit by the plaintiff for a declaration that the defendant's purchase of certain lands in execution of such a certificate was *benami* on behalf of the plaintiff is barred by the provisions of S. 66, C.P. Code. 16 O.W.N. 973=15 I.C. 291. S. 66 has no application in a case where the *benamidar* himself does not claim under the sale certificate. 75 I.C. 196=27 O.W.N. 208.

Revenue sales.—The law that a *benami* purchaser cannot set up a title in opposition to a certified purchaser does not apply when a certified purchaser has purchased it at a sale for arrears of revenue under Act I of 1845. 14 W.R. 372; 12 C. 302; 3 I.C. 124=19 M.L.J. 270.)

Sales by Receiver.—The section does not apply to a sale by a receiver with the approval of the Court. 90 I.C. 116=1926 A. 124.

PROOF OF BENAMI TRANSACTION.—In determining the question the court should not consider a person to be purchasing *benami* for the debtor merely on suspicion but its decision, must rest upon legal grounds. 14 M.I.A. 234. The burden of proof rests on him who alleges that the certified purchaser is a *benamidar*. 12 C.L.R. 186 P.C., where a purchaser is neither in possession of the property nor of the sale deed the purchase is in all probability a *benami* purchase. 48 I.C. 746=(1918) Pat. 323.

CERTIFIED PURCHASER.—A person entitled to a sale certificate is entitled to be regarded as a certified purchaser at any time after acceptance of his bid. 25 W.R. 493.

PERSONS CLAIMING THROUGH THE BENEFICIAL OWNER.—This section bars a suit by persons claiming through a beneficial owner. 26 A. 82; 10 A.L.J. 97. A mortgagee who derived his title from the mortgagor is precluded by the provisions of

S. 66 from bringing a suit for a declaration that the auction-purchaser of the mortgaged property was the benamidar of the mortgagee and was not the beneficial owner. 33 A. 982 ; 26 A. 82 F.B.

PERSONS CLAIMING THROUGH THE BENAMIDAR.—The old S. 317 only applied to certified purchasers. 21 A. 196 ; 46 I.C. 216 ; 26 O. 950 ; 19 I.C. 909 = 19 O.L.J. 330 ; 31 B. 61 ; 20 O. 920 ; 21 M. 7 ; 5 O.W.N. 341 ; 13 M.L.J. 305 ; 4 P.R. 1904 ; 58 I.C. 327. But S. 66 of the new Code applies also to persons standing in the shoes of the purchaser. 29 I.C. 716 ; 16 N.L.R. 87 = 55 I.C. 499 ; 28 M.L.J. 251 = 28 I.C. 205 ; 22 O.C. 222 = 53 I.C. 90 ; 16 I.C. 499 = 10 A.L.J. 97 ; 12 Bom. L.R. 1044 ; 12 A.L.J. 1145 = 25 I.C. 821 ; 36 M. 564. The effect of S. 66 is to improve the position of the certified purchaser and in effect to confer on him a power of alienation he would not otherwise enjoy. Under the old Code if the certified purchaser alienated the property, the result was that the alienee was forthwith defeated by the real owner. Under the present Code the certified purchaser is enabled to confer good title on the transferee because the real owner is debarred from impeaching the title not only of the certified purchaser, but also of the person who has derived title from him. Under the old Code the beneficial purchaser had a title enforceable against the whole world except the certified purchaser while under the present Code, the title of the real owner cannot be enforced against such persons as well as those who claim title derived from the certified purchaser. 24 O.W.N. 1011 = 58 I.C. 327. A mortgagee of the certified purchaser to the extent of his mortgage interest stands in the shoes of his mortgagor, i.e., a mortgagee claiming under a Court-sale purchaser, enjoys the same immunity from suit as his mortgagor. 35 B. 342. A suit for execution of a sale deed and recovery of possession on the ground that the defendant's father purchased the suit properties as benamidar for plaintiff is barred by this section. 29 I.C. 138. The words "certified purchaser" include a person standing in the shoes of the court purchaser. 31 B. 61.

SUITS NOT COVERED BY SECTION 66.

Suits by the certified purchaser against the real purchaser in possession.—If the real purchaser is in possession (actually and honestly) a suit by the certified purchaser as plaintiff against the real purchaser for possession may be resisted on the ground that the certified purchaser was only a benamidar. 23 W.R. 358 P.C. ; 1 A. 290 ; 28 O. 370 ; 5 Bom. L.R. 329 ; 27 A. 443 ; 14 M.I.A. 496 ; 31 I.C. 58 = 11 ; N.L.R. 130 ; 6 N.W.P. 197 ; 8 W.R. 130 ; 9 W.R. 438 ; 21 A. 238 ; 24 W.R. 278 ; 23 O. 699. S. 66 is designed to protect only the person who has obtained a sale certificate and has acquired possession under it. It has no application to a purchaser who seeks to oust another from possession. A real purchaser is entitled to take action under rr. 93 to 103 of O. 21. 31 M.L.J. 877 = 37 I.C. 497. A suit by a certified purchaser against the beneficial owner for possession is not barred by this section. 21 A. 29 ; 14 M. I.A. 496 ; 2 I.A. 154 ; 9 C.P.L.R. 55. A suit by the ostensible purchaser that the property was brought on his own behalf and not *benami* for another is not barred under this section. 18 A. 461.

Suit between rival beneficiaries.—This section does not apply to cases of contest between two persons each claiming to be the real beneficiary under an admittedly *benami* court auction-purchase. (1916) 1 M.W.N. 184 = 33 I.C. 1000.

Suit by the principal against the agent.—Section 66 is no bar to a suit brought by the principal against the agent for the recovery of properties purchased by the agent in his own name but with the principal's money and for the principal's benefit

in a court sale, though without the knowledge of the principal. (1919) M.W.N. 693 = 49 I.C. 794 ; 17 M. 282 ; 18 M. 436 ; 11 M. 234 ; 21 C. 375 (*Contra* held in 22 A. 434 ; 9 L.W. 276).

Suit by the beneficial owner in possession for a declaration of possession.—Such a suit is not barred according to the Calcutta High Court. 23 C. 699 ; 7 L.B.R. 260 = 25 I.C. 810 ; 23 M.L.J. 700 = 16 I.C. 50. But the ruling 23 C. 699 is not followed in 43 C. 20 which follows the Allahabad rulings that the clear intention of S. 66 is to stop *benami* purchases by making it impossible for the real owner to question the benamidar's title. See also 30 C.W.N. 160. According to the Allahabad High Court the suit is barred under the section. 23 A. 175 ; 16 N.L.R. 87 = 55 I.C. 499 ; 32 I.C. 365 = 2 O.L.J. 584. But a possession of over 12 years gives the real purchaser a statutory right and possession for less than that period does not give him any such right. 28 M.L.J. 251 = 21 I.C. 205 ; 11 W.R. 382 ; 13 W.R. 347. Section 66 does not cover a case when a plaintiff who purchased the property in another's name was in adverse possession for more than 12 years. 19 C. 199 ; 27 A. 175.

Suit based on an agreement to convey the property to the beneficial purchaser subsequent to the sale.—S. 66, C. P. Code, is no bar to a suit to enforce specific performance of a contract by the auction-purchaser to convey the property to the plaintiff, even though the plaintiff may allege that the certified purchaser is a benamidar of the plaintiff. 42 M. 615 F.B. ; 43 M. 613 P.C. A purchaser may agree subsequently to the sale to reconvey the property to the judgment-debtor. 10 B. H. C. 344 ; 62 I. C. 720 ; 50 I. C. 546. When the ostensible purchaser acknowledges the right of the real purchaser and gives up possession, or does some act which indicates an intention to waive his right or to restore the property to the real purchaser, the fresh act operates as a valid transfer of property. 11 M. 234 ; 23 A. 175 ; 17 M. 282 ; 18 M. 436. A suit for specific performance based on an agreement to sell by the auction-purchaser cannot be described as a suit brought on the ground that the purchase was made on behalf of the plaintiff, i.e., *benami*. 1923 N. 11 ; 68 I.C. 559. The mere permission to hold possession cannot alone give or transfer a title from the benamidar to the real owner. 23 A. 175 ; 24 C.W.N. 1024 = 59 I.C. 719, in which case it is held that the failure of alleged or *benami* purchaser to assert his rights against the real purchaser during the latter's possession after the auction-purchaser cannot be regarded as a waiver or transfer of the rights. A later Madras ruling, 32 I.C. 434 = (1916) 1 M.W.N. 220, holds that no suit lies for a declaration that the plaintiff is entitled to certain properties on the ground that they had been purchased by the defendant in a court sale *benami* for the plaintiff and that the defendant has no right at all in those properties even though the defendant has subsequent to the purchase recognised the title of the plaintiff. But a suit for the enforcement of an agreement and for recovery of possession on the ground that the defendant purchased the suit property in court auction as benamidar of the plaintiff is barred by S. 66. 29 I.C. 138. An agreement to reconvey the property to the real owner cannot be relied on for the basis of a suit. 22 A. 434 ; 23 A. 175 ; 14 C. 583. When A, after having bid for the property and paid the earnest money on his own account entered into an agreement with B to buy the property for B and himself jointly in certain shares and paid the balance in part out of the money taken from B, the case was not covered by S. 66 and a suit by B was allowed for specific performance of the contract. 24 C.W.N. 27 = 54 I.C. 726. But a suit by a minor against the certified purchaser for specific performance of the contract and possession is barred. 8 I.C. 258.

Suit by a third party against the real or ostensible purchaser.—S. 66 does not preclude a third party from enforcing a claim against the true owner in respect of the *benami* property. 12 C. 302. S. 66 does not preclude a person

purchasing *benami* from setting up his title against a person not being the certified purchaser or a person claiming through him. 2 Hay. 512—Marsh 423; 1 C.W.N. 328. S. 66 of the Code permits the Courts to entertain a suit by a decree-holder against the certified purchaser of property to bring the property to sale in execution of his decree as the property of his judgment-debtor on the allegation that the certified purchaser had purchased the property *benami* for the judgment-debtor who had remained in possession as owner from the date of the purchase and was in possession as such at the time of the attachment. 6 N.W.P. 265; 18 A. 461; 12 C. 302; 21 C. 519; 1 A. 235. This section does not debar a third person from asserting that the certified purchaser is not the beneficial owner. 18 A. 461; 1 A. 235; 21 C. 519; 8 W.R. 130; 10 B.H.C. 344. When a judgment-debtor bought his property *benami* and it was sold up a second time and the new purchaser instead of taking substantial possession only took formal possession and then brought a suit against the judgment-debtor on the ground that he was setting up the ryots against him, such a suit did not lie. 25 W.R. 372; 10 C.L.R. 258. When in execution of a money decree, a decree-holder attached the immovable property of the judgment-debtor who mortgaged it to the plaintiff to pay off the decretal amount, but did not so discharge the decree and the property was sold in execution, a suit by the plaintiff on his mortgage against the judgment-debtor as the owner and the auction-purchaser, being in possession and as holding the property for his own benefit, and not for the benefit of the judgment-debtor, is not barred under S. 66 of the C.P. Code. 37 M.L.J. 586=54 I.C. 967. S. 66 does not prevent a mortgagee from suing on his mortgage without impleading purchaser of the hypotheca in an execution sale previous to suit from showing that this sale was *benami* for the benefit of the mortgagor himself. Therefore an assignee of the mortgagee can also show the *benami* character of such sale. 20 M. 362. A suit by the plaintiff against the certified purchaser is maintainable if the plaintiff does not claim title through the person for whom the defendant acted as benamidar, that is, the plaintiff sues as heir of the last male owner and the defendant was a benamidar of the widow. 35 A. 38. Where a Mahomedan father having bought land at a Court sale with his money in the name of one of his sons settled the same with a tenant who attorned to him and paid his heirs' rent after his death, *held* in a suit brought by the heirs other than the certified purchaser against the tenant for arrears of rent, making the certified purchaser, a *pro forma* defendant, and in which the tenant alleged that he was bound to pay rent to the certified purchaser only and the latter supported him, that the suit was not barred by S. 66 of the Code. 24 C.W.N. 51=54 I.C. 127.

Suit by the real purchaser against a third party.—S. 66 is inapplicable when the real purchaser being in possession brought a suit against the certified purchaser's brother who was managing the property for the plaintiff, for an account and for delivery of certain property connected with the estate. 21 C. 375. When there is no contest between the real purchaser as plaintiff and the certified purchaser at an execution sale and the defendants who contest set up an independent title the suit is not barred. 13 M.L.J. 354. A suit against a purchaser who has not as yet obtained a certificate, is maintainable. 5 A. 478 F.B. A suit for possession against the judgment-debtor, when the purchaser at the Court sale is the agent of the judgment-debtor, and buys the property as agent, though he advances the money on the understanding that he is to be repaid is not barred. 17 M. 282; 18 M. 436. A suit against a third person by the real owner is not barred on the ground that it was purchased *benami* for him even through the benamidar is a co-defendant but admits the claim of the plaintiff. 8 M. 511; 22 B. 672; 8 C.P.L.R. 295; 9 C.L.R. 295; 24 C.W.N. 51; 31 B. 61.

Suit by the certified purchaser against a second purchaser.—The provisions of S. 66 do not prohibit the consideration of the circumstances of a sale to an auction-

purchaser in execution of a decree in a suit by him against a second purchaser to get the second sale cancelled, when the question for determination was whether at the time of the second attachment of the same property the judgment-debtor was in possession as owner of the property or merely as lessee of the certified purchaser. 6 N.W.P. 197.

Suit between joint purchasers.—When property is purchased by A and B jointly and the preliminary deposit is made by both of them jointly, but the balance is paid by one of them only, the sale certificate should be granted to both; and one of them can bring a suit for his share against the other who is certified as the purchaser. 81 I.C. 1029.

Purchase by a member of a joint Hindu family.—When a member of a joint Hindu family purchases property in his own name at an execution sale, it is open to the other members, to claim the property as that of the joint family. S. 66 is no bar to such a claim. 18 O.C. 160=30 I.C. 279; 20 M. 249; 20 M. 39; (1912) M.W.N. 1071; 31 A. 282; 9 M.L.J. 398; 6 M. 135; 19 W.R. 356 P.C.; 19 W.R. 223; 22 W.R. 199 P.C.=1 I.A. 342, affirming 13 W.R. 347; 20 M. 367. The reason is that such members are entitled by operation of law and not by virtue of any private agreement or understanding to treat as part of common property an acquisition made out of the joint family funds. S. 66 does not bar a suit by a member of a joint Hindu family against his father and a purchaser who bought *benami* for him, for partition. 6 M. 135; 20 M. 349; 43 M.L.J. 363=(1922) M.W.N. 584; 9 M.L.J. 298. But this section applies to a suit between the separated members of a Hindu family, irrespective of the fact that where separation took place certain property belonging to the joint family was not actually divided. 37 I.O. 111=3 O.L.J. 568. Where the manager of a joint Hindu family purchased at a court sale certain property in the name of his son-in-law and even though the funds used were out of the family property, other members could not claim a share in it, when the manager admitted against his own interest and in favour of his son-in-law. 40 A. 159 P.C. Where a purchase was made in the name of the mother, the son in a joint Hindu family is debarred from suing under S. 66, O.P. Code, the female not being a member of a joint Hindu family. 19 A.L.J. 787. A suit by a partner for a declaration that the property purchased was partnership property is not barred under S. 66, O.P. Code. 29 A. 557.

Suit by a joint mortgagee.—When one of two co-mortgagees purchases the property a suit by the co-mortgagee to recover one half of the property so purchased is not barred. 25 I.C. 735. When out of two joint mortgagees one alone sued making the other a *pro forma* defendant and obtained a decree in execution of which he purchased the property in his own name and the question arose whether the other joint mortgagee can claim a share of the property purchased, *held* that S. 66 did not apply and he is not entitled to claim a share. 44 M.L.J. 80=72 I.C. 839. If the plaintiff does not rely on the ground that the certified purchaser is a name lender but relies on a certain state of facts as establishing certain other kinds of legal relations between himself and the certified purchaser and entitling him to the property purchased he can rely on such facts and circumstances notwithstanding S. 66 of the C.P. Code. (1919) M.W.N. 693=49 I.C. 734.

Suit against a joint decree-holder purchaser.—In execution of a money decree held by two persons jointly a certain Zamindari property of the judgment-debtor was put up to sale and was with the permission of the Court purchased by one of them in 1902. The purchaser was put in formal possession of the property in 1903. In 1913 the other decree-holder brought a suit against the purchaser and claimed possession of a share of the property alleging that in accordance with an oral agreement the purchase was for the benefit of both the decree-holders; *held* that the suit was barred by the provisions of S. 66. 29 I.C. 447 (*Contra* see 29 A. 557). When one of

the several joint decree-holders applied for the execution of the decree subject to the right of the others, and properties put up to sale were purchased by him, held that the purchase was for the benefit of all the decree-holders and the purchaser could not be allowed, to retain the property as his exclusively, and perpetuate a fraud against the co-decree-holders under cover of S. 66, C.P. Code (*ibid*). S. 66 in no way affects the title of persons otherwise beneficially interested in the purchase such as joint decree-holders. 37 A. 545 P.C. ; 50 I.C. 546 ; 29 I.C. 787 ; 30 I.C. 265 = 19 C.W.N. 1175 ; 29 A. 557 ; 1923 A. 405. There were three mortgagees R, S and M, of a certain property, and one of them, S purchased the equity of redemption. Of the other two R brought a suit against S for recovery of rds of the mortgage money out of the property impleading M as a party. The decree directed the rds of the mortgage money to be realised by sale of rds of the property. In execution of the decree R bought the rds of the property ; held that a suit by R was not barred by S. 66, C. P. Code. 25 I.C. 735. But a suit for possession of property by a decree-holder against a person who purchases the property in his own name disregarding the instructions of the decree-holder to bid at the sale for him after obtaining the Courts' permission, is barred. 1925 N. 41 = 82 I.C. 541.

Suit against the pleader.—The suit for a declaration that the pleader of the plaintiff purchased a certain property at an execution sale for the benefit and as trustee of plaintiff is maintainable notwithstanding S. 66. The pleader will not be entitled to maintain the purchase as against his client. 23 C. 805.

Suit by infant against guardian.—Where the manager of an infant used the money of an infant for buying property at an execution sale and purchased the property fraudulently in his own name. S. 66 is no bar to a suit by the infant to recover the property so purchased. 30 I.C. 212.

Suit based on the ground of fraud.—S. 66 does not prohibit a defendant from questioning plaintiff's title on the ground of fraudulent and fictitious purchase. It provides for dismissal of a suit brought to question the title of a defendant when an auction-purchaser seeks to oust him. 8 W.R. 130. S. 66 refers to suits between benamidar and the beneficial owner and not to cases where a gross fraud has been practised upon a third party. 1 W.R. 328. S. 66 does not apply when the name of the certified purchaser was inserted by fraud. 13 W.R. 85. When a mukarridar of land, sold to satisfy a debt sues to obtain possession, and the purchase is not found to be *bona fide*, but for the party in actual possession, S. 66 is no bar to the suit ; the ground of fraud alone giving plaintiff, right to question the legality of the sale. 14 W.R. 179. A suit for a declaration that the plaintiff is the real purchaser of the property in dispute and that the name of the certified purchaser was inserted in the sale certificate by fraud on the part of the defendant and contrary to the wishes of the purchaser is maintainable. 4 B.L.R. App. 32 ; 13 W.R. 85 ; A.W.N. (1887) 220 ; 23 A. 175 ; 1 C.L.J. 550 ; 17 M. 282 ; 12 C. 204 ; 21 A. 229. S. 66 does not apply so as to help a benami purchaser in a fraudulent transaction. 3 O.C. 229 ; 8 W.R. 130 ; L.B.R. (1893-1900) 16 ; 14 W.R. 179.

A suit by the creditor of the real purchaser.—The section is intended to prevent fraud and would not preclude a suit by a creditor of the real owner of property for a declaration that it belongs to his debtor and not to the certified benami purchaser. 12 C. 204 ; 21 C. 519 ; 1 W.R. 329 ; 8 W.R. 130 ; 6 N.W.P. 265 ; 1 A. 235 ; 18 A. 461 ; 20 M. 362 ; 12 C. 302 ; 7 B.H.C. 21 ; (*contra* in 16 M. 290 ; 21 A. 238 ; A.W.N. (1900) 190 ; A.W.N. (1904) 226 ; 26 A. 82 ; 8 O.C. 306 ; 27 A. 194, are no longer good law being clearly opposed to the language of sub-section (2).

S. 48, T. P. ACT AND SALE.—The principle embodied in S. 48, Transfer of Property Act, that "an interest when it accrues feeds the estoppel" is not applicable to execution sale. A decree-holder does not guarantee the judgment-debtor's title and though no doubt a decree-holder cannot set up against purchaser a secret encumbrance in his own favour, not set up by him in his sale proclamation, the doctrine of estoppel does not apply where an after-acquired title is taken by the grantor under a conveyance made to him as conduit and for the purpose of vesting the title in a third person. 40 O. 178; 17 W.R. 944; 17 W.R. 511.

DOCTRINE OF *LIS PENDENS*.—The doctrine of *lis pendens* applies only to voluntary alienations and not to the case of a purchaser who had bought the property at a sale thereof in the execution of a decree. The doctrine of *lis pendens* is based on the ground that the law will not permit litigant parties to give to other persons, pending the litigation, rights to the property in dispute so as to prejudice the other parties. This doctrine does not apply to sales in execution because in such cases it cannot be correctly said that the owner gives any right to the purchaser, who acquires his rights rather by operation of law. There is a great distinction between a private sale and a sale of the Court in execution of the decree. Under the former the purchaser derives title through the vendor. Under the Court sale, however, the purchaser, notwithstanding that he acquires the right, title and interest of the judgment-debtor, acquires that title by operation of law, adversely to the judgment-debtor so that it could not be said that he derived title from the judgment-debtor or owner. When an attaching creditor succeeds in the suit instituted by him against claimants to the attached property, whose claim had been recognised by the Court he succeeds in effacing entirely their obstructions to his attachment and in re-instating that attachment as having been in full force *ab initio*. 10 B. 400; 31 A. 367. When a sale in execution of a mortgage decree is set aside and the decree-holder purchases the same at a second sale during the pendency in the High Court of an appeal against the order setting aside the first sale to which decree-holder was made no party and which confirmed the first sale, the failure of the auction-purchaser to apply to the High Court for a stay of the execution by the decree-holder would itself be sufficient to show that in justice the property should be allowed to the decree-holder who throughout neglected nothing and only acted in accordance with his right. 23 C. 857. Though in the case of third parties purchasing at execution sales the subsequent reversal or modification of the decree or order under which the sale takes place, does not affect their rights, it is otherwise in the case of decree-holders themselves purchasing, and in their case the purchase is subject to the final result of the litigation between them. The object of the rule in so far as it relates to the judgment-creditors is apparently to prevent the interests of the judgment-debtors suffering by sales of their property before their liability is finally determined, and to avoid judgment-creditors profiting at the expense of their debtors by becoming purchasers in sales pending litigation by way of appeal. 27 M. 98.

The doctrine of *lis pendens* applies to execution sales. 3 Pat. L.T. 296=65 I.C. 325; 23 A. 60. A purchase during the pendency of an appeal from a dismissal of a suit under O. 21, r. 63 is subject to the doctrine of *lis pendens* and the auction-purchaser acquires a right subject to the result of the appeal during the pendency of which such sale took place. 23 A. 60. The doctrine of *lis pendens* does apply to an auction-purchaser, and in respect of that matter, the proceedings before an appellate court are but a continuation of those before the first Court. 15 C. 94; 21 W.R. 349; 12 C. 299; 28 C. 23. A purchaser who takes at a court sale while an appeal is pending takes subject to whatever would be the eventual result of the decision in the pending appeal whether he knew of the *lis pendens* or not. 9 M. 150; 22 W.R. 452. A transfer of the property decreed by the judgment-debtor after the passing of the decree but before action is taken under O. 21, r. 34 is affected by the doctrine of *lis pendens*. 48 I.C. 188=14 N.L.R. 176.

COMMENCEMENT OF TITLE OF THE PURCHASER.—Where immovable property is sold in execution of a decree and such sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute. (S. 65.)

LEGAL CHANGES.—(1) Under S. 316 of the old Code of 1882, the time of vesting of the property in the purchaser was the date of the certificate of sale, that is, the date on which the sale became absolute; under the present Code the title vests in the purchaser from the time of the sale and not from the time when the sale becomes absolute. 15 O. 546; 20 A. 168; 26 I.C. 353; W.R. 1864, 279; 12 I.C. 360=7 N.L.R. 134; 7 N.W.P. 310; 11 B.H.C. 193; 41 A. 526; 28 I.C. 421=1 L.W. 1028. (2) The proviso to S. 316 of the old Code has been omitted; it is therefore not necessary now that the decree under which the sale took place shall still be subsisting at that date.

SCOPE.—It is only when the sale becomes absolute that the property sold vests in the purchaser, but whenever the sale becomes absolute the property sold will be deemed to have vested in the purchaser from the time when it was sold. 2 O. 141 F.B.; 6 C. 389; 11 O. 341; 41 A. 526; 88 I.C. 962 (B.); 87 I.C. 57 (M.); 91 I.C. 1047.

FAILURE TO OBTAIN A SALE CERTIFICATE.—When a Court sale is confirmed the purchaser's failure to obtain a sale certificate from the Court does not vitiate his title. 25 I.C. 8; 17 B. 375; 12 B. 589; 7 B. 254. The rulings to the contrary are no longer good law. 12 C. 597; 17 B. 375; 19 A. 188; 22 A. 168. But confirmation of sale is necessary before title passes. O. 21, r. 92 (1).

WHEN THE SALE IS COMPLETE.—The sale is completed by deposit of the balance by the purchaser under O. 21, r. 85, in the case of immovable property. 29 C.W.N. 575.

EFFECT OF THE RULE THAT PURCHASER'S TITLE COMMENCES FROM THE DATE OF SALE.—**Right and liability to mesne profits.**—The liability of the surplus sale proceeds under S. 169, B. T. Act, is limited to arrears accrued due to the date of the sale and cannot be extended to arrears due up to the date of confirmation thereof. Arrears becoming due between these two dates cannot be recovered from the judgment-debtor. 18 C.W.N. 136=23 I.C. 101. The auction-purchaser is entitled to profits and responsible for loss in respect of the property sold from the date of the sale to him. 1926 N. 17=88 I.C. 893. An auction-purchaser is liable to pay revenue on the property purchased accruing due between the date of the sale and the confirmation thereof. 2 O. 141 F.B.; 6 C. 389. When a tenure is sold in execution of a decree for rent, the landlord cannot sue the auction-purchaser for any rent which accrued before the date of his auction purchase and the only person liable to pay that rent is the tenant judgment-debtor. 2 P.L.T. 248=80 I.C. 223. An auction-purchaser of a share in a village is entitled to claim profits from the date of the sale and not only from the date when mutation is effected in his name in the village papers. 5 O.L.J. 31=45 I.C. 248; 33 A. 45; 18 C.W.N. 136; 14 Bom. L.R. 1046. Under the old Code the right to mesne profits accrued from the date of confirmation. 33 A. 63; 24 A. 475; 15 O. 546; A.W.N. (1887) 217; 7 C.L.J. 1. The purchaser of a Zamindari sold in execution of a decree is entitled to all the rents accruing due from the date of his purchase, and if the tenants after having had notice of his title choose

to continue to pay their rents to or for the use of the former proprietor they do so at their peril and cannot plead such payment in answer to a suit for rent by the new owner. W.R. 1864 Act X Rul. 6 ; 21 C. 383. Under the old Code, the auction-purchaser was not entitled to the rent accruing due between the date of sale and the date of confirmation of sale. 24 A. 475 ; 9 I.C. 25 = 8 A.L.J. 32.

Accretions to the property after sale.—If there are any accretions to the property between the date of the Court sale and the date of confirmation they would become the property of the purchaser. 40 C. 89 P.C. An auction-purchaser of an entire estate at a sale for arrears of revenue is entitled to recover all lands included in the taluk at the time of its settlement as well as all lands which had subsequently accreted thereto by alluvion. 8 C.W.N. 676. Ownership of the property passes at the moment the sale was knocked down to him and the judgment-debtor retains no interest in it which could be attached and sold. 55 I.C. 626 = 38 M.L.J. 441. The title of an auction-purchaser cannot be defeated by any transfer made by the judgment-debtor between the date of sale and the date of confirmation. 15 C.W.N. 312 = 8 I.C. 657.

Rights of successive purchasers at Court auctions.—Under the present Code as the property vests in the purchaser from the date of sale, therefore the auction-purchaser who purchases the property at Court auctions: first of all, has a prior title to all others who subsequently purchase the property at a Court auction even though the latter obtain first the certificate of sale. The same is the case of successive purchasers at sales in execution of mortgage decrees. 32 M. 485 ; 2 M. 108 ; 26 M. 486 ; 5 C. 265 ; A.W.N. (1887) 267 ; 10 B. 553 ; 11 B. 588 ; 19 A. 188 ; 25 I.C. 8 ; 9 B. 10 ; 10 B. 453 ; 22 A. 168 ; 20 C. 25 ; 17 B. 375 ; 10 C.W.N. 44. The purchaser who purchases the property first of all is entitled to it. 2 Bom. L.R. 30. It is not an irregularity to sell a certain property in execution of two decrees separately at the same time. The purchaser who purchases first has a title to the property sold and the second purchaser is entitled to a refund of the purchase money on the ground that what was sold to him was not what was advertised for sale. 2 A. 107.

The auction-purchaser has a right to object to a previous sale as being fraudulent. 9 A. 474.

Insolvency of judgment-debtor after sale but before confirmation.—According to the C.P. Code an auction-purchaser's title dates from the date of sale, provided the sale is confirmed by the Court. Until confirmation, however, he has an inchoate right which he is entitled to have recognised and perfected. An order of adjudication passed against the judgment-debtor does not affect such right, as the Official Assignee only takes the estate subject to the rights of third persons affecting the same and cannot claim to have the sale cancelled on the ground of any equity possessed by the general body of creditors at the time of the order of adjudication. 1 L.W. 1018 = 26 I.C. 421.

Commencement of title and limitation.—Under the old Code the sale was completed on the date of confirmation and application for possession lay within 3 years from that date ; under the present Code the period commences from the date of sale. 17 I.C. 242 = 12 M.L.T. 311 ; 28 M.L.J. 666.

Running of interest on the decree.—A decree, the satisfaction of which has resulted by the decree-holder himself bidding the full amount of the same at the execution sale is not actually satisfied until the sale is confirmed, and the decree-holder is entitled to claim interest awarded by the decree, between the date of sale and the date of its confirmation. 41 A. 526 ; 33 B. 311. A decree-holder is not bound to withdraw the money deposited by the auction-purchaser before the sale is confirmed, and he is entitled to interest on the decretal amount up to the date of confirmation of sale. 25 I.C. 859.

WHAT PASSES AT A COURT SALE.—In determining the interest which a purchaser in execution sale takes, the following circumstances may legally be considered in the enquiry and no single circumstances can be regarded as conclusive by itself. —(1) The character of the debt; (2) the terms of the sale certificate which formed the contract of the parties; (3) the law as understood at the time of the sale; (4) the frame of the suit; (5) the judgment and the decree; (6) the execution proceedings; (7) the advertisement for sale; (8) the adequacy or inadequacy of purchase money. 36 M. 325 P.O.; 29 C. 813. The test is what the Court intended to sell and what the purchaser understood he bought; the question is one of mixed facts and law and must be determined by the evidence in the particular case. The evidence about the fact that how the parties affected by the transaction view it is of much importance. 33 M. 22; 6 C.L.J. 490; 42 I.C. 399=2 Pat. L.J. 725; 10 M. 241; 27 M. 131 P.O.; 1923 N. 149; 17 I.A. 11; 14 I.C. 77; 14 I.A. 84; 12 I.C. 389. It is only what is attached and advertised for sale that passes at a Court sale. 6 W.R. 223. A purchaser under an execution of a decree will get a good title against all persons whom the suit binds 18 C. 164.

Conflicting descriptions of the property sold.—Where in an execution sale there is discrepancy between the conditions in the notification of sale and the certificate of sale of the property, the conditions in the notification are to be taken as of superior authority in dealing with the confusions of rights of innocent third parties whose rights are affected by the variation. 1 C.L.R. 460. When the language of conveyance is comprehensive enough to include "not only an estate or taluka" but also the lands appurtenant to it by means of alluvion and the intention to convey such land is otherwise apparent, the mere mention in the conveyance of the Jamma of the taluka or estate alone and the omission of that of the alluvial lands cannot be held to exclude the latter from the operation of the conveyance. In such a case the entry of the Jamma is merely descriptive. 2 A. 787. If the misdescription of the property in the sale notification goes to the essence of the contract and materially alters the substance of it, the purchase cannot be enforced upon the purchaser. But if such misdescription does not materially alter the substance of the contract the remedy which the purchaser can claim is adequate compensation and not annulment of sale. 29 C. 420; 29 C. 370; 89 P.R. 1868. When the first purchaser knows that the property sold to him by the name of "Joti Jamma" has no real existence, a second purchase of the same property known by the real name of "Shamilat taluk" has a preferential right upon the former. 7 W.R. 4. When along with the application for execution of a decree, an inventory was filed specifying the Zamindari to be sold but not a building situate therein *held* that the sale passed the Zamindari only and not the building. 38 A. 59.

Crops.—The ordinary rule is that the right to the growing crop will pass by a sale of the land without express mention. 13 M. 15. The sale of a plot of land will pass to the purchaser the crops growing on the land unless they had been exempted from the sale in execution. 73 I.C. 451=4 Pat. L.T. 318; 2 B. 670; 13 M. 15; 15 C. P.L.R. 141.

Buildings erected on land.—The ownership of the structures which are erected by the proprietor does not pass to the purchaser. *Prima facie* and in the absence of any thing else, it is the land or the share in the land which passes at the sale and not the structure or buildings on the land. 1926 C. 97=52 C. 862. A purchaser must be held to have purchased the property subject to the prior sales of the property and the equitable interests created thereby. 10 B. 453; 11 B. 588; 23 A. 478; 32 M. 242. When along with the application for execution of a decree an inventory of property was filed specifying the Zamindari to be sold but not a building situate thereon, *held* that the sale passed the Zamindari rights only and not the building. 38 A. 59. In execution of a decree against a Zamindar, his right, title and interest in the village

were sold. The price fetched was very inadequate as compared with the value of the villages. The property was subject to a lease which expired at the death of the Zamindari. The village belonged to an impartible estate governed by the law of primogeniture; held that the interest sold was the life interest of the Zamindar, 22 M. 110. The execution purchaser purchasing the property under attachment takes it free from attachment and he gets unrestricted rights of alienation and acquires any equity or right to redeem which the judgment-debtor may have had. 44 B. 292. The sale of *uperwal mahal* in execution of a decree cannot convey a title to the contiguous *kachar mahal* which was then under water, which was neither attached, nor advertised for sale, the revenue of which was not mentioned in the sale certificate. Therefore the purchaser of *uperwal Mahal* cannot claim the *kachar Mahal* when it is left dry, on the ground that it is accretion to his Mahal. 7 A. 388.

One of several tenants.—A sale in execution of a rent decree against one of several tenants cannot affect the interests of those not made parties. It does not affect either the transferee of the interest of the judgment-debtor. 18 C.L.J. 271=21 I. C. 47.

Interests of co-sharers.—The purchaser gets only the interest of the judgment-debtor and not that of his co-sharers. 3 W.R. 119.

Right, title and interest of the judgment-debtor.—A purchaser at a sale in execution of a decree takes merely the right, title and interest of the judgment-debtor and is subject to the subsisting rights in the land which have been granted or created by any former proprietor. 11 M.L.A. 433; 30 C. 550; 6 B. 193 F.B.; 6 Bom. L.R. 1013; 11 B. 588; 6 B. 495; 8 B. 489; 9 B. 10; 7 M. 248; 21 B. 205; 22 B. 945; 29 B. 234; 1 N.L.R. 125; 7 B.H.C.A.C. 24; 9 B.H.C. 304; 1 B. 581; 1 S.L.R. 104; 10 B. 453; 9 M. 495; 9 A. 97; 13 A. 28; 17 B. 375; 142 P.R. 1908 F.B.; 41 I. C. 511; 1892 P.J. 346. When the proprietary rights of a judgment-debtor in a certain *Mausa* were sold the purchaser was entitled to a *Mahal* which was submerged in the river as well although it was not given in the sale proclamation. 9 A. 136. The auction-purchaser cannot question the validity of a certain deed, previously made in favour of a third person by the judgment-debtor. 18 W.R. 39. An execution sale is the sale of the right, title and interest of the judgment-debtor. 3 W.R. 65; 8 W.R. 291; 3 Agra 171; 7 N.W.P. 288; 1 A. 240 F.B.; 17 W.R. 511; 22 W.R. 382; 15 W.R. 363. An auction-purchaser of the judgment-debtor's right and interest cannot seek to receive what his judgment-debtor could not have received. 3 Agra 194. Where in execution of an *ex parte* decree obtained by a Zamindar in a suit against a sold-out tenant for arrears of rent, the tenure is sold and purchased by the former, he takes nothing by the purchase and must give way to the *bona fide* purchaser. 19 W.R. 198. An auction-purchaser of the right and interest of a ryot in his house in a village cannot acquire better title, than can be transferred by private sale, if according to the village custom the ryot was not competent to alienate the house with its site without the permission of the landlord. 3 Agra. Ap. Rev. 7. All easements appurtenant to the property are conveyed by auction sale in the same manner as by a private sale. 22 W. R. 522. All that is sold in execution of a money decree is the right, title and interest of the judgment-debtor. 16 W.R. 119; 10 I.O. 424=21 M.L.J. 550; 2 W.R. 130. When property is described at the time of the sale as the property of the judgment-debtors who are sued as merely the representatives of a deceased debtor *prima facie* what is sold is the property of the deceased debtor. 24 W.R. 383. An auction sale only transfers the right, title and interest of the judgment-debtor, and a person claiming such property as his own can dispute the right of the purchaser to interfere with his possession at any time within 12 years of the occurrence of the disturbance. 12 B. H.C. 15. Where the site and building upon it are sold separately and the land is first purchased by the decree-holder he cannot be considered to have purchased the house

free from the right of the purchaser of the house upon it. 22 W.R. 209. When the *wajib-ul-ars* of the village gave the tenants residing in that village only a right to sell or mortgage the materials of their houses, a purchaser of the house could not acquire a right to occupy the house without the permission of the landlord. 10 O.C. 4. Where a house is sold without the site on which it stands the purchaser cannot get possession of the house without also getting possession of the site. 6 N.L.R. 25 = 69 I.O. 500. The sale in execution of a decree of the rights and interest of a Zamindar in a village passes also the buildings appurtenant to the Zamindari rights in the absence of evidence that they were excluded. 4 A. 381; 24 A. 218. In a sale in execution of a decree against the representative of a deceased person the description of the property to be sold should contain the name of the defendant and should say "the right, title and interest of the defendant as representative of the deceased." 18 W.R. 55; 8 B.H.C. A.C. 37. The purchaser buys the property with all risks and all defects in the judgment-debtor's title except as provided by rules 91 and 93 of O. 21. 23 A. 355; 3 O. 806; 6 B. 193; 27 A. 537; 27 C. 264; 29 C. 370; 29 C. 420. The purchaser in execution is bound by estoppel on the same principle which binds the judgment-debtor. 35 C. 877; 22 C. 909; 9 C. 265; 39 B. 311.

Effect of adjustment.—The adjustment between the decree-holder and the judgment-debtor after the sale but before confirmation of sale of the property of the judgment-debtor does not affect the right of the auction-purchaser in getting the sale confirmed. 10 I.O. 149. When the rights and interests of a judgment-debtor as the recorded proprietor of a Government rent roll and revenue paying estate are sold in execution, the released rent free lands therein do not pass to the purchaser. 5 W.R. 170. A sale in execution of a decree for costs passed against A personally can lawfully pass property belonging to A but it cannot have the effect of passing the property inherited by A's co-heir. 20 W.R. 483. A collusive transfer by the judgment-debtor does not affect the right of the auction-purchaser, the latter can sue to obtain possession of the estate purchased by him. 9 W.R. 521; 3 Agra. 15. The purchaser need not trace back his title beyond *fieri facias*. 1 Ind. Jur. N.S. 359. Where a certain property is sold in execution of decrees against several persons the auction-purchasers purchase the right of the judgment-debtors respectively in their decrees and it is left to them to get it decided who is the real owner. 60. P.R. 1875.

CAVEAT EMPTOR.—In India an attachment is made at the risk of the attaching creditor and he is responsible for any results which can be traced to an unlawful attachment carried out upon application made by him. In the case of a sale in execution in India, although there is no warranty of the decree-holder that the property does belong to the judgment-debtor, the property is sold as the property of the judgment-debtor on a representation to the effect made to the Court by the decree-holder who is taking out execution. A stranger whose property is sold behind his back without any authority does not need to have the sale set aside. When the purchaser is deprived of the property purchased he is entitled to recover the purchase money from the decree-holder. 14 O.C. 343 = 13 I.C. 803; 15 Bom. L.R. 41 = 18 I.C. 381. In sales of immovable property made by a Civil Court in execution of a decree there is no implied warranty by the execution creditor who has caused the sale of the title of the judgment-debtor. The purchaser is bound to satisfy himself of the character and interest of the judgment-debtor in the property before he bids and in case it should turn out that the judgment-debtor had no interest whatever in the land put up for sale the purchaser has no remedy against the execution creditor unless he can establish fraud or wilful misrepresentation on the part of that person. 4 B.H.C. A.C. 114; 9 B.H.C. 92; 2 B. 258; 6 B.H.C. 258. The rule of *caveat emptor* applies where a party purchases an estate sold in execution after full notice that a person other than the judgment-debtor claims rights and interests in the property. 9 W.R. 556. When a person purchased a certain property out of Court from a debtor and made a gift of it

to his wife, and afterwards he purchased the same property in a mortgage decree of the same property (the mortgage having been effected prior to the private sale) he was held not entitled to recover the purchase money from the decree-holder. He took the risk of the buyer. 6 N.W.P. 168. The principle of *caveat emptor* is applicable to Court sales only to this extent that there is no covenant for title implied in a Court sale. It means nothing more than that the auction-purchaser takes only the interest in the property sold which his judgment-debtor had in law at the time of the sale. The scope of the doctrine does not extend to the consequences of the defects or irregularities in the proceeding to the sale which might render it void or voidable. 36 M. 196; 12 I.C. 444; 141 P.R. 1879. A purchaser at a Court sale of immovable property buys at his own risk and there is no warranty of title or guarantee that the property will answer the description given unless the sale is vitiated by fraud on the part of the decree-holder or judgment-debtor. 33 I.C. 1003=9 But. L.T. 169. An auction-purchaser cannot attack his own purchase except on the ground that the judgment-debtor had no saleable interest in the property sold. 46 I.C. 617=3 Pat L.J. 516; 42 I.C. 453; 74 I.C. 134=1 Pat. L.R. 73=37 C. 67; 46 I.C. 788. A purchaser must abide by his bargain except as provided in O. 21, r. 91 or in the case of fraud. 63 I.C. 126=25 C.W.N. 756; 4 N.L.R. 274. The rule of *caveat emptor* does not apply when the auction-purchaser applies under O. 21, r. 90 to set aside a sale and proves material irregularity with substantial injury. 1925 A. 445=87 I.C. 278.

Purchaser of the undivided share.—The execution purchaser of the interest of one of several joint tenants in a family dwelling house and in certain lands let out in service tenure is entitled to joint possession of the dwelling house with the other share-holders and also to a share in the service rents. 10 O. 244. A purchaser of the undivided share, a part of which was encumbered, must be presumed to have purchased the share which was unincumbered, in the absence of specific indication to the contrary. 29 A. 463. When a decree is passed against some of the members of a joint Hindu family, a sale of the interest of those persons in the family property does not give the purchaser a right to receive the possession of a definite quantity of land. 22 W.R. 214. A person who at a sale in execution of a decree has purchased the share of a member of a joint Hindu family and subsequently sued for and obtained a decree against the other members of the family for possession of such share in the property consisting of the joint family dwelling house and land is entitled to be put in actual possession of the portion of the dwelling house. 2 W.R. 30 F.B.; 8 W.R. 239; 13 W.R. 74; 10 O. 244.

DECREE AGAINST A HINDU FATHER.—By the Mitakshara law a judgment against the father of the family can be executed against the whole of the joint property in every event but one, when the debt in respect of which the judgment has been obtained was a debt incurred for illegal or immoral purposes. The presence of the words "right, title and interest" of the judgment-debtor in a sale certificate is consistent with the sale of every interest which the judgment-debtor might have sold and does not necessarily import in such cases that nothing is sold but his interest as a co-sharer. In case like this the substance and not the mere technicalities of the transaction should be regarded. 44 C. 524 P.O. In the absence of any objection by any member of the family when joint family property is put up for sale in execution of a decree against a manager, it may be inferred that the intention was to pass the interest of all the members of the family in the property, though it may be open to other members of the family to dispute that intention and to satisfy the Court either that the alienation was not binding on them, that the debt incurred by their father was not binding on them or any other ground that their interest in the joint family property had not passed to the auction-purchaser. 25 Bcm. L.R. 494=79 I.C. 402. The words right, title and interest of the judgment-debtor might mean the father's share

alone or the son's share also and it depends on the intention to be gathered from the circumstances in each case. 22 I.O. 873; (1917) Pat. 71. In a *Mittakshara* joint Hindu family the father can for a personal debt of his own sell not merely his own interest but also the interest of the sons in the joint Hindu family property provided the debt is not an illegal or immoral one. 18 O.W.N. 42—22 I.O. 873; 43 I.O. 478; 33 A. 71; 33 A. 7; 33 A. 436; 20 O. 453. When there is nothing to show any limitation of the extent of the interest sold, whether the sale took place in execution of a decree on a mortgage or in execution of a simple money decree obtained against the father of a joint Hindu family, it may be presumed that the family property and not merely the undivided property of the father was sold. 14 A. 190.

See also Chap. III.—“Decree against Hindu father.”

PURCHASER IN EXECUTION OF A DECREE AGAINST A HINDU WIDOW.—In order to determine the exact interest which passes at a sale in execution of a decree against a Hindu widow or a qualified proprietor similarly situated, the test to be applied is whether the suit in which the sale was directed was brought against the widow upon a cause of action personal to herself, or one which affected the whole inheritance of the property in suit. When it appears that the decree against the widow is in respect of the husband's estate and binds the reversionary heirs, the purchaser of her right, title and interest in execution takes the estate absolutely. 1 I.O. 62—9 O. L.J. 346; 6 O.L.J. 490; 7 O. 357; 11 I.A. 66; 9 C.L.R. 350; 14 I.O. 839—15 C.L.J. 423. When a Hindu widow is forced by legal necessity to mortgage not only her life interest but also the estate itself for a legal necessity, the enforcement of that mortgage must be considered to be equal legal necessity with the mortgage itself. 1 Pat. L.W. 77—37 I.O. 403. A purchase, while a wrong representative was on the record does not bind the reversioners of the widow. 29 I.O. 6; 52 I.O. 109; 31 I.O. 920; 35 I.O. 124; 38 M. 1076.

SALE IN MORTGAGE DECREES.—When a mortgage decree-holder purchases the property sold in execution of the mortgage decree and the mortgage debt is not fully satisfied by such sale, the mortgagee is entitled to seek out execution for the balance of the decretal amount against the remaining property covered by the mortgage giving credit to the mortgage only to the extent of the amount of the purchase money. 18 A. 31; 16 O. 682; 16 O. 132; 19 O. 4; 4 C.L.J. 246. When the decree amount in a mortgage decree is satisfied by the sale of 33 out of 34 items the last item cannot be sold in execution of the decree. 12 I.C. 130—10 M.L.T. 240. Purchase of the mortgagor's rights, by his mortgagee extinguishes the mortgagor's right to redeem and there are no rights of the latter left which could be sold in execution. 7 O.C. 307. When property is purchased at a sale in execution of a money decree with a notice that another person had obtained a decree enforcing a lien upon it such a purchaser cannot maintain his possession against another purchaser of the same property in execution of the decree enforcing the hypothecation. 3 A. 647.

INNOCENT AUCTION-PURCHASER.—A purchaser of certain property *bona fide* and for valuable consideration, belonging to two debtors cannot plead that he got the rights of both when in fact he purchased the property from one of them in whose name the property stood. 3 W.R. 171. A purchaser is not innocent when the slightest enquiry on his part would ascertain the facts connected with the sale held in execution. 29 A. 62 F.B. When execution proceedings have been concluded apparently with regularity and in conformity with law and the only defect alleged is that the decree in which the execution proceedings are founded was fraudulent, an innocent purchaser would be protected and it would be necessary to establish that he was a party to the fraud or was apprised thereof before he paid his money. 16 I.C. 811. A purchaser at an execution sale who is a stranger to the suit is not bound to inquire into its accuracy or to judge of its validity and is justified in believing that the Court has done all that the law requires. 25 B. 337 P.O.; 28 B. 125.

Equities of the judgment-debtor.—A purchaser at a sale in execution of a decree purchases the property subject to all the equities against the judgment-debtor and cannot take up the position of *bona fide* purchaser for value without notice. 78 I.C. 668. Courts will as far as possible protect innocent purchasers from the consequences of irregularities and defects of procedure. But patent defects for want of jurisdiction cannot be overlooked. 18 L.W. 747. *Bona fide* purchasers for valuable consideration and without notice of a sale in execution of a decree are not in every case protected from having the sale set aside under the law. It must be decided in each case in accordance with the principle of justice, equity and good conscience whether the sale ought to be set aside or not. 9 W.R. 196; 20 W.R. 120; 7 A. 450; 17 O. 414. A *bona fide* purchaser who is not the decree-holder, or a person claiming through him at an execution sale, in execution of a valid decree, acquires a valid title to the property purchased by him and is not affected by the subsequent reversal or modification of the decree. 14 O. 18; 10 A. 166; 26 C. 734; 37 O. 107; 67 I.C. 894; 29 B. 435; 3 L. 88; 64 I.C. 611. It is only an innocent purchaser for a valuable consideration who is not a party to any fraud that can claim the benefit of purchase in irregular execution proceedings. 36 I.C. 681; 27 A. 62 F.B. See 37 I.C. 387. Where a creditor of the estate ignorant of the true state of affairs, sued the widow in possession and the illegitimate son who would have been the legal representatives but for a will left by the debtor under which other persons were entitled to the estate, and obtained a decree, and in execution the property in possession of the widow was purchased by a stranger. *held* in a suit by the legatees that the sale was binding on him. 29 M.L.J. 698=31 I.C. 920. A sale can be set aside as against a decree-holder-purchaser, but not against *bona fide* purchasers who were not parties to the decree. 10 A. 166 P.C.; 17 A.W.N. 28; 26 O. 734; 27 O. 810. Judicial sales fraudulently procured will not give a good title to the purchaser. The burden of proving that he acted in good faith and without notice of the fraud is in the first instance upon the purchaser. 27 C.W.N. 587=74 I.C. 975. A *bona fide* purchaser is entitled to the value of the improvements *bona fide* effected by him, when the sale is set aside. 36 M. 194.

Innocent purchaser not knowing the encumbrance.—Where a person purchases certain immoveable property at a Court-sale in execution of a money decree in ignorance of the existence of a mortgage upon the same and subsequently sells it privately to a third party who also purchases without knowledge of the existence of the mortgage, and where the mortgage is afterwards disclosed and the private purchaser is compelled to pay the amount thereof the latter is not entitled to claim compensation from the original owner as the purchaser of property in a Court-sale takes it not only with all benefits but subject also to all liabilities. 29 I.C. 392=2 L.W. 517=31 A. 583.

Existence of a cross-decree.—When there is a *bona fide* purchaser for fair value in execution of a valid decree the mere existence of a cross-decree, for a higher amount in the judgment-debtor's favour would not in the absence of fraud be sufficient to set aside such sale. 14 O. 18 P.C.; 15 O. 557; 76 P.R. 1890; 26 M. 428; 17 M. 58; 14 C. 627; 19 M. 219; 21 B. 427 F.B.; 21 B. 463; 22 B. 88; 26 O. 734; 22 A. 377; 23 A. 25; 24 A. 931; 26 B. 543; 11 C.W.N. 756; 34 C. 811.

WHEN THE SALE IS SET ASIDE.—When property is sold in execution of a decree and the sale is set aside by the appellate Court as being the property of another person, the auction-purchaser gets no title to the property by the purchase. 22 W.R. 452. When a sale in execution of a decree is set aside no such rights and interests are left to the purchaser as can be sold on his behalf. 5 W.R. 42. An auction-purchaser of property sold in execution of a decree is not bound to look beyond the decree. When, therefore, he purchases the property in execution of a decree which subsequently turns

out to be invalid he is entitled to recover the purchase money from the person who got it. 45 A. 869. O. 21, r. 93.

Mesne profits.—When a sale is set aside the judgment-debtor or his representative is entitled to mesne profits from the date on which he gave notice to the purchaser subject of course to the payment of compensation for improvements effected by him. 8 P.R. 1868.

Compensation for improvements.—If one enters upon land as a stranger purchaser in execution sale and effects improvements thereon, he is entitled to compensation therefor upon a reversal of such judgment sale irrespective of any question of his *bona fides*. But even if the proposition so stated is too broad and good faith must be proved on the purchaser's part in making the improvements, the good faith required does not go beyond an honest belief of the purchaser in the validity of his title. 36 M. 194. Where on account of fraud and collusion between the decree-holder and the auction-purchaser, the execution sale is set aside, the judgment-debtor is entitled to compensation instead of mesne profits from the auction-purchaser for the period he was in possession. The Court has jurisdiction to order the same under S. 151, C.P. Code (15 C.L.J. 187, followed); 18 O.W.N. 1299=22 I.C. 839. When a sale is set aside on the ground of want of notice under O. 21, r. 22 and it appears that the judgment-debtor was before the Court and his interest is liable to be sold in satisfaction of the decree, the petitioner can only be permitted to recover possession of the property on payment to the purchaser of what he has paid together with interest less any amount he may have received for mesne profits. 47 M. 288.

Refund of revenue paid by purchaser when the sale is set aside.—The auction-purchaser is justified in considering himself that he is the person liable to pay to the Government revenue that became due during his auction-purchase on the principle that he became the proprietor from the date of sale and the duty of paying the revenue devolved upon him from that moment and hence the auction-purchaser has a right to sue for the amount so paid. 51 I.C. 706.

RETURN OF PURCHASE-MONEY IN CERTAIN CASES.—Where a sale of immoveable property is set aside under Order 21, rule 92, the purchaser shall be entitled to an order for repayment of his purchase-money with or without interest as the Court may direct against any person to whom it has been paid. (O. 21, r. 93.)

SCOPE.—Under O. 21, r. 93 an auction-purchaser is entitled to recover his purchase-money or some part of it, even when the judgment-debtor had some saleable interest in the property sold. 79 P.L.R. 1913=18 I.C. 795 (dissented from in 52 P.R. 1919; 39 A. 144). When the judgment-debtor had a saleable interest and the sale was not set aside the auction-purchaser has no right to maintain a suit for refund of the money. 52 P.R. 1919; 51 I.C. 95=22 O.C. 42. An auction-purchaser can only apply under O. 21, r. 93, after having the sale set aside under O. 21, r. 92, before confirmation. He has no substantive right after the sale is confirmed. 49 I.C. 359= (1918) M.W.N. 655; 42 I.C. 453. When the auction-sale is set aside, the auction-purchaser is entitled to a refund. 41 I.C. 200; 37 I.C. 763; 6 Pat. L.T. 769. When the judgment-debtor has a saleable interest however small, the purchaser purchases at his risk and there is no warranty that the property will answer to the description given in it. 28 O. 285; 17 M. 228; 27 M. 191 P.O.; 3 I.C. 438=10 C.L.J. 492; 2 A. 828; 23 A. 60; 9 M. 437; 27 A. 587; 42 P.R. 1896.

SALE MUST BE SET ASIDE UNDER R. 92.—When a Court in some proceedings between other parties has decided that the judgment-debtor had no saleable interest in the property, the judgment-creditor is not liable to make a refund of the purchase-money. 16 M. 361 ; 24 B. 521. This rule applies to cases when the sale is set aside under O. 21, r. 92. 42 P.R. 1896 ; 9 M. 437 ; 8 M. 101. No action lies against the decree-holder for return of purchase-money paid at a Court-auction in execution of money-decree when the purchaser is evicted by a third party who successfully establishes his title to the property in a regular suit. 52 I.C. 818—15 N.L.R. 140.

APPLICABILITY.—Sale by a Receiver.—The sale of an insolvent's property by a Receiver appointed under the O.P. Code is not a judicial sale. The principles applicable to these sales are those of private sales, where the right, title and interest of an insolvent in a *hak* is sold by a Receiver, the purchaser was not entitled to recover the purchase-money from the person to whom it was paid by the Receiver. 1 C.P.L.R. 26.

RETROSPECTIVE EFFECT.—The change made in O. 21, r. 93 has not a retrospective effect, and an auction-purchaser whose right to obtain the purchase-money was acquired before the coming into force of the new Code; is not affected and his right is not extinguished. 50 C. 115 ; (1920) M.W.N. 736=60 I.C. 66. When an execution sale was held under the old Code and it subsequently turned out that the judgment-debtor had no saleable interest in the property the purchaser is entitled to maintain a suit against the decree-holder for the recovery of money paid over to him even though the non-existence of saleable interest was ascertained after the coming into force of the new Code. 60 I.C. 66=(1920) M.W.N. 736. Alteration in the law is not retrospective and the auction-purchaser whose right to obtain the purchase-money was acquired before the coming into force of the new Code is not affected and his right is not extinguished. 35 M. 419 ; 23 M.L.J. 487 ; 39 M. 803 ; 12 L.W. 639 ; 36 C.L.J. 132.

PARTIES.—The judgment-debtor is a necessary party to the application or his representation should be brought on the record. 6 M. 197 ; 7 B. 424. An order without a notice to the judgment-debtor is a nullity. 33 I.C. 235=3 L.W. 105.

THE PURCHASE-MONEY WITH INTEREST, ETC.—The purchaser when the sale is set aside owing to irregularities in the conduct of the sale for which the decree-holder is responsible, is entitled to sue and recover from the decree holder the purchase-money paid by him into Court, the interest thereon and also the poundage-fee and other expenses of the Court-sale. 39 M. 803. The Court may refuse interest if the purchaser has largely contributed to the loss he has sustained, or the sale is set aside for no fault of the decree-holder. 8 M. 101 ; 5 A. 364. The Court may disallow interest if it is more than he is entitled to. 13 A. 383. The purchaser is entitled on the reversal of the decree to compensation for improvements effected on the property irrespective of any title of his *bona fides*. 1926 N. 160=89 I.C. 18 ; 36 M. 194. When a sale is set aside under O. 21, r. 92, the Court has power to order interest on the purchase money also being paid to the purchaser under O. 21, r. 93. 59 I.C. 782 P.C.=40 M.L.J. 141=48 I.A. 24. The claimant is entitled to the usual charge of 6 per cent per annum. The purchaser should not be charged with the expenses of the sale. 6 N.W.P. 309. The purchaser must account for the rents and profits. 23 W.R. 393 ; 3 M.I.A. 42 ; 14 I.C. 456 ; 19 C.W.N. 1167.

ANY PERSON TO WHOM THE MONEY HAS BEEN PAID.—The expression includes a decree-holder who has obtained a saleable share under S. 73, C.P. Code. 13 A. 383. When a sale is set aside under O. 21, r. 92, the purchaser shall be entitled to receive back his purchase-money from any person to whom the purchase-money had been paid ; consequently a purchaser is entitled as against the sheriff to a refund of

money which the latter had merely received as his proper commission on the sale which was subsequently set aside. 183 P.R. 1883 ; 45 P.R. 1886 ; 68 P.R. 1885. A purchaser of property, when the sale is set aside, is entitled to recover the purchase-money from the decree-holder. 14 O.C. 343 ; 39 M. 803.

PERIOD OF LIMITATION.—The period of limitation for an application for a refund is three years from the accrual of the right under Art. 181, Limitation Act. 11 A. 372.

ENFORCEMENT OF AN ORDER UNDER R. 93.—When an order is made under this rule it may be executed in the manner prescribed for the execution of decrees, see S. 36. 47 I.C. 630 = 23 M.L.T. 355.

REPAYMENT BY THE PURCHASER ON THE SALE BEING CONFIRMED.—An auction-purchaser is bound to refund the purchase-money which he had taken out from the Court on the order of the lower Court, setting aside the sale, being set aside and the sale being confirmed in appeal. 5 Pat. L. W. 132 = 48 I.C. 275.

SUIT FOR REFUND.—Under S. 315 of the old Code of 1882 the purchaser at a sale in execution of a decree was competent to maintain a suit against the decree-holder for recovery of his purchase-money when the judgment-debtor was found to have had no saleable interest in the property sold. The purchaser was not restricted to the special procedure in the execution department mentioned in S. 315. 40 A. 411 ; 22 B. 783 ; 37 C. 67 ; 40 M. 1009 ; 36 C.L.J. 132 ; 10 O.W.N. 274 ; 5 A. 577 ; 7 C. W.N. 105 ; 13 C.W.N. 1080 ; 8 M.L.J. 194 ; 114 P.R. 1908 ; 3 A.L.J. 819 ; 5 A. 577 (F.B.) ; 35 B. 29 ; 17 I.C. 437 = 23 M.L.J. 487 ; 5 C.W.N. 240 ; 13 A. 383 ; 35 A. 419 ; 36 A. 529 ; 11 M. 269 ; 16 M. 361 ; 43 M.L.J. 487. (The contrary rulings were 13 A. 283 ; 35 A. 419 ; 36 A. 529 ; 17 M. 226). The law is changed under O. 21, r. 93 and the remedy by suit is no longer available. 39 A. 114 ; 39 M. 803 ; 40 M. 1009 ; 43 A. 60 ; 46 B. 833 ; 36 C.L.J. 132 ; 41 I.C. 924 ; 22 C.W.N. 760 ; 64 I.C. 628 ; 28 C.W.N. 20 ; 65 I.C. 230 ; 25 B. 337 ; 3 C. 806 ; 36 A. 529 ; 37 C. 67 ; 35 B. 29 ; 42 I.C. 453 ; 52 I.C. 174 ; 61 I.C. 805 = 13 Bur. L.T. 152 ; 88 I.C. 379 = 1925 O. 404 ; 17 I.C. 437 = 23 M.L.J. 487 ; 46 I.C. 783 = 22 C.W.N. 760. Apart from fraud, negligence or other breach of trust a purchaser at an auction-sale is not entitled to maintain a suit under the present Code for the return of the purchase-money on the ground that the judgment-debtor had no saleable interest in the property sold. 42 I.C. 440. The contrary view still is that the suit is maintainable even after the new C.P. Code came into force. 37 C. 67 ; 35 B. 29 ; 36 A. 529 ; 36 C.L.J. 205 ; 4 Lah. 354. A suit for refund lies against the judgment-debtor on the ground of fraud or mis-representation. 24 Bom. L.R. 308 ; 39 M. 803 ; 39 A. 114 ; 35 B. 29 ; 46 B. 833 ; 3 Pat. L.J. 516. A purchaser of immovable property at a Court-auction is entitled to sue to recover the whole or a portion of his purchase-money on proof that the existence of an encumbrance had been concealed from him by the decree-holder. Such an action however must be for damages on the ground of fraud and must be brought within the period of limitation prescribed by Art. 95 of the Limitation Act. 16 I.C. 215.

LIMITATION FOR SUITS.—Art. 120 governs a suit by an auction-purchaser in Court-sale to recover purchase-money paid, from a third person who attached some of the sale proceeds as being the property of the judgment-debtor. 40 I.C. 187 ; 16 M. 361 ; 35 A. 419. When after an auction-sale the judgment-debtor is declared to have no saleable interest in the property sold, by a decree of Court, period of limitation begins to run from the date of such a decree and not from the date when the purchaser was deprived of the possession of property purchased by him. 1926 C. 297 = 30 C.W.N. 79 ; 46 C. 676.

APPEAL.—An order for refund under O. 21, r. 93, is not appealable. 33 I.O. 235—8 L.W. 105.

REVISION.—An order under O. 21, r. 93, for refund of purchase-money is liable to revision under S. 115, C.P. Code. 33 I.O. 235; 9 M. 487.

REFUND OF PURCHASE-MONEY IN OTHER CASES.—When a sale had been treated as incomplete by the Court directing a fresh sale without setting aside the previous one, the purchaser of property in the previous sale whose deposit of a portion of the sale price had been withdrawn by the Nazir, for his commission is entitled to the refund of his money, and the Court has authority to direct the Nazir to refund it, there being no cause of action against the judgment-debtor. 68 P.R. 1885; 183 P.R. 1883; 46 P.R. 1886.

SALE OF A DECREE.—When in execution of a decree against a judgment-debtor his interest in certain decree was sold and a portion of the decree had been satisfied by putting the decree-holder judgment-debtor in possession of a portion of the property, it was held that the auction-purchaser got only the unexecuted portion of the decree. 6 O. 243 F.B.

Equities against the purchaser.—When a decree is sold in execution of another decree and the purchaser seeks to execute it against the judgment-debtor, it is open to the latter to plead that the decree has been satisfied by him before it was sold although satisfaction was not certified under O. 21, r. 2. 78 I.O. 776.

Partition decree.—The auction-purchaser of a share in a partition decree of a judgment-debtor is not entitled to be placed in separate possession of the portion which would have passed into the possession of the judgment-debtor if the latter had executed the decree. 37 A. 120.

When the decree is satisfied before sale.—Where a person, stranger to the execution proceedings purchases property *bona fide* at an auction-sale held in execution of a decree, his sale cannot be set aside on the ground that the decree had been satisfied out of Court before the sale took place. 19 B. 463.

Mortgage decree.—The purchaser of the right, title and interest of the mortgagee in a mortgage decree is not entitled to *khas* possession, if before his suit for possession the mortgage is redeemed. 27 I.O. 890.

Sale of a mortgage-decree.—A purchaser of a mortgage decree is the representative of the holder of such a decree and is entitled to execute the decree in any manner lawful for the holder thereof irrespective of what is conveyed to him by the sale certificate. 22 M.L.J. 161=13 I.O. 324. The interest of a purchaser is certainly more than the interest of judgment-debtor at a sale in execution of a mortgage decree. 1923 M. 160. The purchaser of a property from the original mortgagor is entitled to redeem the property from the sub-mortgagee who purchased in execution of his decree, the property. 5 I.O. 935=7 M.L.T. 191.

REVERSAL OF THE DECREE IN EXECUTION OF WHICH THE SALE TOOK PLACE.—A *bona fide* purchaser who is not the decree-holder or a person claiming through him at an execution sale in execution of a valid decree acquires a valid title to the property purchased by him and is not affected by the subsequent reversal or modification of the decree. 14 O. 18; 10 A. 166; 26 O. 734; 37 O. 107; 67 I.O. 894; 29 B. 435; 3 L. 88; 64 I.O. 611; 27 O. 810; 43 B. 235; 38 O. 622; 38 A. 240; 1 Pat. L.J. 43. A purchase by a stranger at a sale in execution of an *ex parte* decree stands good notwithstanding that subsequently thereto the decree is set aside on the ground that no summons had in fact been served on the defendant. 38 O. 622. When a sale in execution of a decree in force at the time has taken place it cannot be afterwards

set aside as against a *bona fide* purchaser not a party to the decree on the ground that the decree has been set aside by the Court of appeal. 30 M.L.J. 497 ; 34 I.C. 760 ; 19 M.L.T. 98—32 I.C. 391 ; 26 B. 548 ; 32 C. 296 ; 15 C.W.N. 875 ; 20 C.W.N. 665—31 I.C. 894 ; 10 W.R. 154 ; 1 B.L.R. A.C. 184 ; 12 W.R. 508 ; 8 B.H.C. 99 ; 19 W.R. 234 ; 6 N.W.P. 291 ; 11 C. 362 ; 15 W.R. 365 ; 15 W.R. 372 ; 20 W.R. 120 ; 2 C.L.R. 223 F.B. The title of a *bona fide* purchaser at a sale in execution who was no party to the decree which was valid at the time of the sale is not invalidated by the setting aside of the decree subsequently. A.W.N. (1899) 180. A sale in execution of a decree is not affected by the subsequent reversal thereof. 29 B. 435. A purchaser is not bound to enquire into the correctness of the decree under which he purchases. 2 C.P.L.R. 9. If a sale takes place in execution of a decree in force and valid at the time of sale, the property thereby sold passes to the purchaser ; and if the decree is afterwards reversed, it does not affect the validity of the sale. 7 W.R. 312 ; 8 W.R. 300 ; 10 W.R. 154 ; 11 B.L.R. A.C. 54 ; 12 W.R. 508 ; 6 N.W.P. 291. When the land of the judgment-debtor is sold in the execution of a decree and on appeal the decree is reversed the judgment-debtor is entitled to recover the land itself and not merely the proceeds of the sale thereof. 5 M. 106. Under the old Code, the purchaser acquired a title only when the decree under which the sale was held was still subsisting at the date of confirmation of the sale. 29 A. 591. But under the present law it vests in the purchaser from the date of sale and not date of confirmation.

When the decree-holder is the purchaser.—The purchase by a decree-holder of immovable property belonging to the judgment-debtor in execution of an *ex parte* decree becomes *ipso facto* void when the *ex parte* decree is afterwards set aside. 2 L. W. 1066—31 I.C. 305. One of several mortgagees brought a suit on the basis of the mortgage making the other mortgagees *pro forma* defendants and obtained a decree in his own name ; subsequently the property was put up to sale in execution of the decree and was purchased by the decree-holder alone ; *held* that the equitable right of the other mortgagees attached to the purchase-money and not to the property purchased. 32 I.C. 171. When the sale becomes invalid the purchaser is entitled to compensation. When an auction-purchaser who is a stranger enters on the land purchased in a Court-sale and makes permanent improvement on the land, he is entitled to compensation on the reversal of the judgment and sale becoming invalid thereby irrespective of his *bona fide*. 12 I.C. 444 ; 10 A. 166 ; 25 B. 357 ; 14 C.L.J. 300. A sale can be set aside as against the decree-holder purchaser but not against *bona fide* purchasers who were not parties to the decree. 10 A. 166 P.C. ; 17 A.W.N. 28 ; 26 C. 734 ; 27 C. 810 ; 27 M. 98 ; 30 M. 295 ; 13 M.L.J. 231 ; 6 C. L.J. 92. The purchase by the decree-holder is subject to the final result of the litigation between him and his judgment-debtor, though in the case of a stranger purchaser, the subsequent modification of the decree does not affect his rights. 27 M. 98 ; 27 C. 810. A purchaser at a Court sale who is not a party to the suit is not bound to go beyond the decree and the order for sale, and if he purchases *bona fide* in the sale under the decree which was then valid and in force, his title will not be defeated by the mere fact that the decree is invalid on account of a trust estate having made liable for the personal debt of a legatee. 26 I.C. 369—(1914) M.W.N. 92 ; 29 B. 435 ; 30 M. 295 ; 10 A. 66. A judgment pronounced by a Court upon an erroneous view of the law and subject therefore to the reversal by an appellate tribunal, is treated as valid for all purposes of protection or justification to the party acting under it before reversal and the same rule applies when the judgment is vacated for irregularity or the like reason not attributable or chargeable to the purchaser for which he is not to blame. 20 C.W.N. 819—35 I.C. 339. When a decree is passed against a defendant in a civil suit and his property is put up for sale in execution proceedings, and he does not ask for a stay of execution, the purchaser at the execution sale acquires a good title although it may happen that eventually the decree against the defendant is set aside on appeal. There is a very great

distinction between sales in execution of Civil Court decrees and sales by Revenue Courts for arrears of assessment. If it appears that as a matter of fact the defendant in the revenue proceedings is entitled to hold his lands free of assessment, any sale which takes place on the footing that he is bound to pay assessment is invalid and the purchaser at such sale cannot acquire a good title except by adverse possession. 22 Bom. L.R. 1082=59 I.C. 118. When a decree is set aside, a sale in execution of it may still hold good. 4 O. 142 F.B.

PURCHASER FROM AN AUCTION-PURCHASER.—A purchaser from a decree-holder auction-purchaser in execution of an *ex parte* decree cannot be said to be a *bona fide* purchaser for value. 32 I.C. 849. The purchaser of a property from the auction-purchaser (a decree-holder) cannot treat as a nullity subsequent proceedings of the execution Court in which the execution sale is set aside with notice to the decree-holder, but in the absence of and without notice to such purchaser; as such proceedings being good proceedings against the decree-holder are good also as regards the purchaser who claims through the decree-holder. But such purchaser is entitled to a refund of the price paid by him with interest from his vendor. 41 I.C. 200; 31 I.C. 894.

POSSESSION AND TITLE OF AUCTION-PURCHASER.—An auction-purchaser under a defective execution sale who obtains possession would have a good title until the defect is discovered, and if not challenged within the time allowed to set aside the sale his title would become absolute. But if he does not get possession his title would be open to any objection that may be taken by the person in possession. 45 B. 1186.

PURCHASER UNDER THE MADRAS RENT RECOVERY ACT.—When a Zamindari village was mortgaged and brought to sale in execution of a decree upon the mortgage and the mortgagee became the purchaser, he did not become by the purchase a Zamindar under the above Act so long as he was not recognised by the Government or the Collector as a Zamindar and he did not obtain a separate assessment and registration of the village in his name under S. 8 of the Reg. XXV of 1802. 5 M. 145 (not followed in 26 M. 589 F.B.). When pending the attachment of a tenant's interest in a certain land in execution of a decree of a Civil Court the landlord (under the Madras Rent Recovery Act VIII of 1865) brings it in execution of his decree, the landlord purchaser must be held to be subject to the creditor's attachment. 8 M. 573 (followed in 16 M. 479).

PURCHASER OF A NON-TRANSFERABLE HOLDING.—When the judgment-debtor owned a non-transferable occupancy holding which was sold in execution of a decree against him the judgment-debtor, having full knowledge of the execution proceedings and not having objected to the sale, was not competent to resist the purchaser after confirmation of sale. 9 O.W.N. 972 (26 C. 727, followed).

PURCHASE OF A TENURE.—The sale of a tenure does not extinguish it, but there is a transmission and not an extinction of interest. The purchaser takes the existing tenure subject to protected interest, but with power to annul incumbrances thereon by recourse to the prescribed procedure. 35 O.L.J. 292=69 I.C. 126.

EXECUTION OF A RENT DECREE.—A sale of the right, title and interest of the judgment-debtor in execution of a rent decree obtained by a co-sharer landlord may pass the entire tenancy to the purchaser. 18 O.W.N. 708=24 I.C. 259. When a lessee of a transferable tenure sold his interest to a third person, but after the transfer the name of the lessee remained as registered tenant, and subsequently the landlord brought a suit against him for arrears of rent accrued due partly before, and partly after the purchase and obtained a decree for the sale of the tenure held that the decree

might be executed against the tenure although it was in the transferee's possession before it was passed, it not appearing that the Zamindar had knowledge of the transfer before the date of the decree. 3 O.L.R. 146.

SALE IN EXECUTION OF A FRAUDULENT DECREE.—When a purchaser at the execution sale brings a suit for possession, the judgment-debtor can resist the suit on the ground that the decree in execution of which the plaintiff became the purchaser was fraudulent and that the decree-holder himself purchased the property. The Court is bound to go into these questions in such a suit. 34 I.C. 897, 911.

PURCHASER AND RIGHT OF PRE-EMPTION.—A sale in execution of a decree is not liable to pre-emption. 203 P.L.R. 1910=8 I.C. 777; Punjab Pre-emption Act. The right of pre-emption of an otti mortgagee does not arise in the case of involuntary sales unless the statute under which the sale takes place provides for the exercise of such a right. The statutory provisions of O.P. Code as to sales in execution of decrees are inconsistent with the ottidar's right of pre-emption (under the Madras Law of Pre-emption) against a purchaser in Court auction. 41 M. 582 F.B. (13 A. 221, followed).

PURCHASERS UNDER INVALID SALES.—A purchase by a stranger without notice of the fact that the amount realised by previous sale of other lots of the property attached was more than sufficient to satisfy the decree in execution is invalid. 45 I.C. 699.

THE SALE OF MOVEABLE PROPERTY OF A THIRD PERSON IS NOT A MERE IRREGULARITY and the owner is entitled to sue for its restitution, or for damages. 6 N.W.P. 52; 9 W.R. 118; 14 W.R. 120.

PURCHASER OF THE PROPERTY OF A STRANGER.—When property of a stranger is attached and his objection under O. 21, r. 58, is rejected on the ground that it was preferred on a day fixed for the sale and the property was sold, the owner is entitled to follow the property in the hands of the auction-purchaser and to recover either the property or its value. A.W.N. (1893) 198.

Difference between attachment and sale in the case of a stranger's property.—The attachment gives the creditor only certain rights; the title to the property only continues in the owner and will so continue even if his objection to the attachment be disallowed. The sale passes the title. It affects the owner's title differently and to a greater degree than an attachment. (1911) 2 M.W.N. 531.

RIGHTS AGAINST HEIRS AND REPRESENTATIVES.—In a case where the right of inheritance really vests, the purchaser of the rights of a deceased judgment-debtor does not acquire the entire estate, but acquires it subject to all legal and equitable rights of inheritance. 14 W.R. 448; 4 C. 142 F.B.; 20 B. 338.

PURCHASERS IN EXECUTION OF A MONEY DECREE AND A MORTGAGE DECREE.—Where in execution of a money decree a person purchased certain properties, and it was found that the sale was held after the passing of a mortgage decree but before the sale of the property in execution thereof, held that he was bound by the subsequent sale of the property in execution of the mortgage decree. 42 I.C. 424. The purchaser of a certain property in execution of a money decree cannot resist a sale of the same property in execution of a prior existing mortgage decree. The fact that the mortgage-decree was treated as a money decree at the time of his purchase and it was amended only after the purchase so as to be a mortgage decree cannot be a valid ground for his resistance. At the time of his purchase the lien under the mortgage

bond if not under the decree was subsisting and he could only take the property with the charge upon it. A.W.N. (1883) 57.

MORTGAGEE PURCHASER AND PURCHASER IN EXECUTION OF A REVENUE DECREE.—Where in execution of a mortgage decree the mortgagee himself purchased the property and obtained formal possession and before that suit was brought the property was sold at a sale for arrears of revenue to another person subject to the mortgage, it was *held* in a suit for possession by the mortgagee purchaser that he was not entitled to a decree for possession but was entitled to have the mortgaged property put up for sale if the other purchaser failed to redeem. 35 I.O. 532—1 Pat. L.J. 133. A purchased a holding in execution of a decree on a mortgage held by him against the admitted tenant. B subsequently purchased the same holding in execution of a decree for rent held by a co-sharer landlord. *Held* that the title of A was superior to that of B who as purchaser at sale in execution of a decree for rent by a co-sharer landlord was in the same position as a purchaser at a sale in execution of money decree, that the question of the transferability of the holding could not be raised at the instance of B who was the representative in interest of the tenant and was bound by the same estoppel as the judgment-debtor whose right, title and interest had been purchased by him. 15 I.O. 718. When a sale in execution of a rent decree takes place prior to the sale of the same in respect of a mortgage decree, the former purchaser has a prior right to the latter. 21 I.O. 126.

PURCHASERS IN EXECUTION OF TWO MORTGAGE DECREES.—Of two purchasers purchasing the same property sold simultaneously in execution of two mortgage decrees, the one who purchases in execution of the decree enforcing the earlier mortgage has a prior right to possession over the other. 2 A. 698.

PURCHASER IN EXECUTION OF A MORTGAGE DECREE, AND A MORTGAGEE BY A CONDITIONAL SALE.—When property was sold under a mortgage decree the right of the purchaser prevailed over that of a mortgagee by conditional sale whose mortgage was executed only after the simple mortgagee had obtained the decree though before the actual sale of the property under the decree. 6 W.R. 67; 10 W.R. 15.

ADVERSE POSSESSION AGAINST THE PURCHASER.—A person purchased a part of a mortgaged property from the mortgagor during the pendency of a suit by the mortgagee to enforce his mortgage which was a simple one. Subsequently the mortgagee got a decree for sale and in execution of it himself purchased the property and instituted a suit for possession against the purchaser; *held* that the purchaser was a representative of the mortgagor and as such was not competent to set up adverse possession against the plaintiff. 33 I.C. 657. Auction-purchaser stands in the shoes of the judgment-debtor. A plea of limitation that would be good against the judgment-debtor is good also against the purchaser. 6 B.H.C.A.C. 220.

SUIT BY THE AUCTION-PURCHASER FOR POSSESSION.—Parties.—A judgment-debtor is not a necessary party to a suit by an auction-purchaser for possession of the property against strangers. 2 S.L.R. 80. The non-joinder of a puisne mortgagee in a suit on a prior mortgage in which the decree provides for the sale of the mortgaged property in the event of default being made in the payment of the mortgage amount is not fatal to a suit for possession by the decree-holder who is also the purchaser in execution. 17 M. 17.

PURCHASER OF SHARES OF EAST INDIAN RAILWAY COMPANY.—Although the company's deed of settlement under which the Act of Parliament

declared that the company should be regulated, gave to the Board of Directors a power of approval or disapproval of intending share-holders, they had no option as registering a share-holder who purchased shares in execution and that they were also bound to grant him under the circumstances a new share certificates. 1 Ind. Jur. N.S. 258.

RIGHT OF THE PURCHASER TO OBTAIN A SUCCESSION CERTIFICATE.

—A purchaser of a debt due to the judgment-debtor in execution of a decree against the latter is entitled to the succession certificate under the Act, he being a purchaser at the court-sale of part of the effects of the deceased creditor (judgment-debtor). 18 B. 315.

PURCHASER OF A DEBT DUE FROM AN INSOLVENT.—A purchaser of a judgment-debt from an insolvent's creditor is entitled to have his name entered in the schedule of the creditors of the insolvent. 16 M.L.T. 58=23 I.C. 815.

SECTION 53, T.P. ACT AND THE PURCHASER.—A person who steps in by operation of law (e.g. auction-purchaser at a Court-sale and not by an act of the owner) is not a subsequent transferee within the meaning of S. 53, T.P. Act. 39 B. 507.

APPLICABILITY OF RULES RELATING TO SALES.—The rules of C.P. Code relating to the sales in execution of decrees do not apply to proceedings under S. 18 (3) and (4) of the Provincial Insolvency Act. (1918) M.W.N. 479.

EFFECT OF SETTING ASIDE A SALE ON OTHER ATTACHMENTS OF THE SAME PROPERTY.—When there are several attachments of the same property under several decrees and a sale in respect of one decree is set aside under O. 21, r. 89, it does not put an end to other attachments. 13 M.L.J. 221.

CHAPTER IX.

QUESTIONS TO BE DETERMINED BY COURTS EXECUTING DECREES.

(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives and relating to the execution, discharge or satisfaction of the decree shall be determined by the Court executing the decree, and not by a separate suit.

(2) The Court may subject to any objection as to limitation or jurisdiction treat a proceeding under this section as a suit, or a suit as a proceeding and may if necessary order payment of any additional Court-fees.

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.

Explanation.—For the purposes of this section, a plaintiff whose suit has been dismissed, and a defendant against whom a suit has been dismissed, are parties to the suit. (S. 47.)

LEGAL CHANGES.—(1) "The committee have omitted sub-clauses (a) and (b) of S. 244 of the old Code because they are of opinion that a question regarding the amount of any mesne profits or interest should be determined by the decree and not in execution. It will then be possible to exercise an effective control over the action taken by Subordinate Courts in dealing with such matters." (2) The words "or the stay of execution thereof" after the words "execution, discharge, or satisfaction of the decree" have been omitted. See *infra*. (3) Sub-clause (2) is new. It gives legislative recognition to the practice of the Courts under the old Code. (4) "The committee have redrafted sub-clause (3) and made it compulsory on the Court to determine questions arising as to the representatives of the parties. It is inexpedient that separate suits should be instituted for the decision of such questions. The delay and expenses involved are often very great and result in the needless protraction of litigation." (5) The explanation to the section is intended to put an end to a conflict of decisions. See Report of the Sub-Committee.

OBJECT OF THE SECTION.—The object of the section is to provide a cheap and expeditious remedy by empowering the Court executing the decree to determine questions arising in execution proceedings without requiring the parties to bring a separate suit in respect of every question that may arise between them in such

proceedings, 19 C. 683 P.C. ; 80 I.C. 49=20 N.L.R. 93 ; 17 C. 769 ; 30 M.L.J. 238 P.C. This section checks needless litigation by means of separate suits. 11 B.L.R. 149. This section is liberally construed in order to avoid multiplicity of suits. 9 C.L.J. 358. Sub-S. (2) was intended to obviate the injustice caused by a mistake in the initiation of proceedings, and to enable a court to treat a suit as an application and vice versa. It does not enable one proceeding to be treated both as a suit and as an application. 1 L.W. 443=24 I.C. 484. A party afraid of execution proceedings cannot obtain reliefs by a separate suit. 8 P.R. 1902 ; 14 P.R. 1886.

SCOPE:—The widest and most liberal construction should be placed on the section. 34 C. 672 F.B. ; 23 A. 361 ; 7 A. 73 ; 33 C. 857 ; 17 C. 711 F.B. ; 20 W.R. 162 ; 9 C.L.J. 358 ; 30 M.L.J. 238 P.C. ; 20 N.L.R. 90=83 I.C. 1031 ; 20 W.R. 162. To admit an application under this section, the decree must be capable of execution and must be still in course of execution, 10 I.C. 991. This section does not apply when third parties are concerned. 29 I.C. 976 ; 1 L.L.J. 230 ; 15 M. 226 ; 23 A. 346. It relates not only to proceedings instituted by the decree-holder, but also to applications made by the judgment-debtor. 23 M. 377. The effect of the section is to debar a suit in the circumstances mentioned in the section. 1 I.C. 193. But it is no bar to a defendant setting up by way of defence, a matter relating to the execution of the decree, though if he were the plaintiff, he would be debarred from suing on the ground that the plea could not be gone into in execution. 41 M.L.J. 261=(1921) M.W.N. 536 ; 1922 C. 311 ; 26 C. 946. This section does not apply to set aside a decree and sale thereunder on the ground of fraud. 24 I.C. 501=27 M.L.J. 100 P.C. ; (1914) M.W.N. 636 P.C. The section bars a suit brought for the determination of certain questions relating to execution discharge, or satisfaction of the decree. 1 I.C. 193=19 M.L.J. 1 ; (1912) M.W.N. 166.

Matters arising subsequent to the passing of the decree.—Question relating to the execution of a decree and arising between the parties to a suit in which the decree was passed, or their representatives, must be such as have reference to matters arising subsequent to the passing of the decree. 67 I.C. 753=4 U.P.L.R. (L.) 93.

A claim by a stranger.—A person whose claim has been upheld in execution proceedings is not a party to the suit in which the execution proceedings took place and has no right to invoke the aid of this section as a bar to the plaintiff's claim. 10 M.L.T. 261. A suit by a stranger is not barred under this section. (1919) Pat. 465=53 I.C. 20.

Representatives of the parties.—A suit relating to execution is barred as between the representatives of the decree-holder and the judgment-debtor. 1922 N. 189=68 I.C. 693.

APPLICABILITY.—S. 47 has never been in force in the Agency tracts. 36 M. 126 ; 10 M.L.T. 261. See also 30 M. 280.

S. 47 is not applicable to foreign Court decrees. (1913) M.W.N. 605=20 I.C. 704.

It does not apply to proceedings before Revenue Courts under N.W.P. Act, XII of 1881. 26 A. 149, nor to proceedings under Act X of 1859. 15 C. 179 ; 13 W.R. 34 ; 7 I.C. 387.

Public Demands Recovery Act (I of 1895).—A suit lies to set aside a sale under the Act on the ground of fraud. 32 C. 1130 ; 28 C. 813 ; 29 C. 94 ; 6 C.W.N. 630 ; 6 C.W.N. 331 ; (contra in 34 C. 787 ; 32 C. 691 ; 2 C.L.J. 504). An executing Court cannot try the validity of a certificate granted under the Act by the revenue authorities on the ground of its being made without jurisdiction. 10 I.C. 532=14 C.L.J. 83.

decrees.—All questions as to the propriety of the execution of a rent decree by sale and as to the suppression of the sale proclamation are under S. 47. 19 O. 341 ; C. 769.

The purchaser of a non-transferable occupancy holding from whom the landlord has accepted rent for a long period as marfatdar can under S. 47, take objection to execution proceedings against the original tenant in respect of his holding. 64 I.O. 124 (O.).

Deccan Agriculturists Relief Act.—An order passed in execution proceedings refusing to appoint the Collector under S. 22 of the above Act falls under S. 47 and is appealable. 15 S.L.R. 47=63 I.O. 310.

N.W.P. Rent Act.—Any question as to the liability of land to sale under S. 9 of the Act falls under S. 47. 6 A. 393 ; 6 A. 448 ; 24 O. 355 ; 27 O. 415 ; 27 O. 187 ; 26 O. 727 ; 9 C.W.N. 972 ; 34 C. 199.

A question whether the judgment-debtor is entitled to a non-saleable tenure falls within S. 47. 8 A. 146. F.B.

T.P. Act.—A sale in contravention of S. 99 of the Act may be set aside under S. 47. 35 O. 61 ; 28 A. 681 ; 8 O.O. 327 ; 31 B. 462 ; 10 C.P.L.R. 21 ; 30 M. 313.

Collector's orders.—The order of a Collector setting aside a sale as void *ab initio* in a proceeding under the N.W.P. Tenancy Act (II of 1901) must be considered as passed under S. 47 and is appealable to the District Judge. 2 A.L.J. 130.

QUESTIONS ARISING BETWEEN THE PARTIES TO THE SUIT OR THEIR REPRESENTATIVES.—An application cognizable under this section must be one between the parties, i.e., between the parties arrayed against each other as decree-holder and judgment-debtor or their representatives. 7 A. 681 ; 29 A. 207 ; 6 A. 12. It does not apply to a controversy of two judgment-debtors *inter se*, because such a dispute does not relate to the execution, discharge or satisfaction of the decree. 29 A. 207 ; 31 M. L.J. 44=35 I.O. 179 ; 18 I.O. 312 ; 44 O. 698 ; 30 M. 72. So this section does not apply to a suit for contribution brought against a joint judgment-debtor by the other debtor who was compelled to satisfy the decree in full. 18 A. 106 ; 31 M.L.J. 44. But co-defendants whose interests are opposed to each other as regards the order passed and the properties concerned are parties under the section. 19 I.O. 448=24 M.L.J. 437. A decision of the executing Court as to the order in which the properties of several defendants are to be sold is appealable under this section. 45 M.L.J. 478. This section does not apply when the question concerns two rival decree-holders. 11 O.W.N. 433 ; 2 W.R. Mis. 42 ; 9 W.R. 223 ; 8 M. 494 ; 5 O. 592 ; 29 M. 183 ; 70 I.O. 329 ; 27 A.W.N. 201 ; 1923 A. 573=74 I.O. 351. The questions of the equities between the judgment-debtors as to who will be entitled to delivery of the property even though the deposit is by one only are not triable by the executing Court. 18 I.O. 312. This section does not apply to a question between a party and his representative. 25 B. 681 ; 11 S.L.R. 74=43 I.O. 165 ; 5 O.L.J. 551=48 I.O. 39 ; 70 I.O. 329. This section does not apply to a question between the judgment-debtor and the auction-purchaser. A decision on a question between them is not appealable. 61 I.O. 961=13 L.W. 15 ; 78 I.O. 666. This section does not apply to a question between the representatives of a party after the satisfaction of the decree. 1 S.L.R. 172 ; 25 O. 49. Where one of the two plaintiffs dies the dispute between the surviving plaintiff and a third person, each of whom claims to be the legal representative of the deceased plaintiff is not a dispute between the parties to the suit and consequently an order substituting one of them in place of the deceased plaintiff is not appealable either under S. 104 or O. 48 of the O. P. Code. 20 I.O. 898=16 O.O. 350. Rival mortgagees are not considered as parties to the suit. 52 I.O. 980. Where several decree-holders against the

same judgment-debtor apply for satisfaction of their decrees out of the same fund, any one of them is entitled to show that his rival's decree is a fraudulent or a sham one, but it is not open to him to do so in execution proceedings. 38 M. 221. An application by the decree-holder to dismiss his execution case does not fall under S. 47 and an order thereon, rejecting it is not appealable. 57 I.O. 396. The word "arising" means directly arising between the parties to the suit. 7 A. 170 F.B. In execution of a decree against one of the co-owners, his interest was purchased by the decree-holder, and the plaintiff his assignee instituted a suit for partition making the judgment-debtor and the other co-owners parties; held that as the judgment-debtor was only a formal party, the substantial defendants being strangers, the suit was not one between the parties to the suit within the meaning of S. 47. 29 M. 294; 28 M.L.J. 642 = 29 I.O. 976. A controversy between a usufructuary mortgagee and a simple mortgagee as to their respective rights under their mortgages during the execution of a decree against a tenant for arrears of rent is not one between parties to the suit or their representatives. 52 I.O. 980 = 26 C.L.J. 416. A dispute between an assignee from the decree-holder and a person having a charge over the decree is one between persons who occupy substantially the position of a decree-holder and the order passed relating to such dispute is not appealable under S. 47, C.P. Code. 1926 M. 691 = 93 I.O. 649.

Additional Parties.—A suit by the representative of the decree-holder auction-purchaser of the joint Hindu family property against the judgment-debtor and his sons (who were no parties to the suit) is maintainable. 25 Bom. L.R. 494 = 73 I.O. 402.

PARTIES TO THE SUIT.—Exonerated and discharged parties.—The explanation makes it clear that a defendant against whom a suit is dismissed is a party to the suit. 73 I.C. 419 = 25 Bom. L.R. 440; 47 I.C. 864 = 78 I.O. 225 = 1924 A. 313. A party against whom a claim is abandoned is not a party to the suit. 17 M.L.J. 416. An exonerated person is not a party to the suit. 10 W.R. 191; 40 M. 964; 41 M. 418 F.B. Hence if his objection under O. 21, r. 100 fails he can bring a regular suit. 15 N.L.R. 146 = 52 I.O. 736. When a party has been properly impleaded as one of the defendants in a suit and the case against him would have proceeded to judgment but for the fact that the plaintiff elected to abandon a part of his claim, and the suit was in consequence dismissed against this defendant, he is considered as a defendant against whom a suit is dismissed within the meaning of S. 47. 41 M. 418 F.B. A defendant whose name appears in the decree without having been previously struck off from the record is a party notwithstanding the fact that he has been exonerated by the decree passed by the Court without an adjudication on the controversial question between him and the plaintiff. 23 M.L.T. 206 = 45 I.O. 671. When A was impleaded as one of the defendants in a suit for the recovery of a sum of money, but his name was removed from the array of defendants and a decree was passed against his father B, but the decree stated that A was exempted and was to have his own costs, A was held not to be a party to the suit. 52 I.O. 187. Exoneration from the suit may be due to various causes and the question whether a party remains on record for the purposes of S. 47 in spite of such exoneration will depend on the nature and scope of the order having regard to the pleadings, and the reason which led to such exoneration. Where a party to a mortgage suit is exonerated on the ground that he sets up a title adverse both to the mortgagor and the mortgagee, he does not remain a party to the suit. 40 M. 964; 15 N.L.R. 146 = 52 I.O. 736. A person who is exempted from the operation of the decree but is ordered to pay costs by the appellate court is a party to the suit. 8 W.R. 114. A defendant against whom the claim is not dismissed, but whose name is struck off from the record at the instance of the plaintiff is not a party to the suit. 80 I.O. 470. A person against whom a decree is passed in a representative capacity is a party to the suit. 88 I.O. 542. The words "parties or their representative" apply only to *de facto* parties or their representatives admitted as such on the record to be parties or representatives.

97 P.R. 1887 ; 17 O. 769 ; 14 M.L.J. 78 ; 13 O.W.N. 1182. A person who is joined as a defendant as heir to the deceased against whose estate the decree is claimed and against whom the suit is dismissed is a party to the suit. 25 P.L.R. 1915=28 I.C. 14. Where the name of the defendant was struck off by the consent of the plaintiff but his name was retained in the cause title in the decree finally drawn up, he was considered as a party to the suit under S. 47. 94 I.C. 123=1926 M. 687. The mere exoneration of a party does not have the result of making him cease to be a party. The chief question is whether his name is struck off from the record or not. 1926 M. 484=(1926) M.W.N. 251 ; 23 M. 361 F.B. But see 40 M. 964. A party who is put on the record whether rightly or wrongly is a party to the suit. 2 C.L.R. 545 ; 13 A. 290, *contra* in 8 O 402. A person who intervenes in a suit, withdraws his defence but remains a party on the record is a party to the suit. 27 O. 242 ; 17 M. 316. One of the parties to the suit which has been compromised against his consent is a party to the suit and can challenge the decree in execution. 8 M. 473 ; 30 M. 72 ; 17 B. 49 ; 10 W.R. 191. A person who was a party to the original suit, though not to the appeal is a party. 17 B. 49. An intervenor against whom no order was passed is not a party to the suit. 23 A. 346. A defendant who took no interest in the suit and neither put in a written statement, nor appeared at any stage of the litigation is nevertheless a party to the suit and if he were wrongly ousted from certain property his proper remedy is by way of application to the executing Court. 1 L.L.J. 230. A Collector seeking Court-fees in a pauper suit under O. 33, r. 3, is a party. 29 A. 64 ; 18 A. 419. *Contra* was held under the old Code in 18 B. 454 ; 6 B. 590 ; 15 B. 77 ; 23 M. 73 ; 21 M. 113 ; 19 A. 326. The reversioners who are brought on the record after the death of a Hindu widow to represent her husband's estate are parties. 4 A. L.J. 117 ; 16 O. 603 ; 20 M. 119 ; 23 O. 454. But when a decree is against the widow personally, her husband's reversioners are not her representatives. 12 O. 458 P.C. A surety for the performance of any decree, &c., as contemplated in S. 145, C.P. Code, is a party within the meaning of S. 47. 28 M. 117 ; 13 M.L.J. 484 ; 20 C.L.J. 119=27 I.C. 10 ; A.W.N. (1888) 13 ; A.W.N. (1886) 38 ; 15 W.R. 538 ; 134 P.R. 1886 ; 10 Bur L.T. 15=34 I.C. 247 ; 8 W.R. 24 ; 2 B. 71 ; 2 Bom. L.R. 549 ; 62 P.R. 1871 ; 99 P.R. 1887. Where a decree declared the right of a plaintiff to nominate a person to an office in a religious institution and the plaintiff nominated A, but died before inquiry into fitness and the plaintiff's successor withdraws the nomination, A was considered a party to the suit in the objection proceedings. 17 M. 343. A person obstructing the decree-holder in obtaining possession at the instigation of the judgment-debtor is not a party to the suit. 24 M. 73 ; 2 C.W.N. 311. The next friend of a minor in a pauper suit which is dismissed and the decree in which directs the next friend to pay the Court-fees is not a party to the suit. 23 M. 73 ; 9 M.L.J. 265. A benamidar of the mortgagees is not a party to the suit. 44 B. 352. Where a decree is passed against a Karnavan of a Tarwad in his representative capacity, all the members of the Tarwad are considered as parties to the suit and any objection to execution by any one of them is under S. 47. 30 M. 215 ; 24 M. 658. A person who as a party in one character may not be so in another character. 12 P.R. 1887 ; 11 B.L.R. 149 P.C. When a decree-holder bids for the property through an agent, a proceeding initiated by the debtor for recovering from the defaulting purchaser, the loss on re-sale is one between the parties to the suit. 12 M. 454. A third party objecting to the sale of the attached property is not a party to the suit. 6 A. 21 ; 10 M. 53 ; 2 W.R. 56. A question in execution between the plaintiff and one of the several defendants in the suit who was not made a party to the appeal in which the decree under execution was passed is one coming under this section 17 B. 49. A defendant, in a mortgage suit, other than the mortgagor, claiming some other property attached in execution as his own is not a party to the suit. 11 A. 74. A person impleaded in a mortgagee's suit for sale of the property against whom no relief is claimed is not a party to the suit. 32 A. 321 ; 23 A. 346 ; 11 B.L.R. 149 P.C. A surety and one who has executed a bond under S. 55 (4) is a party to the suit according to

S. 145, C.P. Code. 10 Bur. L.T. 15=34 I.C. 247. When a property is attached under decrees of two different Courts and when the judgment-debtor in one is also a rival decree-holder in the other, he is a party to the suit. 12 I.C. 78. A purchaser of a portion of the mortgaged property joined as a defendant in a mortgage suit cannot under S. 47 object to the sale of the mortgaged property in execution of the final decree on the ground that he acquired a new and independent interest in that portion of the property. Any right that he has to an interest outside and independent of the mortgage must be enforced by proper proceedings outside the mortgage suit. 47 I.C. 374.

Minor.—A minor who is represented by a married sister or an uncle whose interest was adverse to the minor's was never a party to the suit in the proper sense of the term. "Parties" means parties who had been properly made parties in accordance with the provisions of the Code. Therefore a suit on behalf of the minor for a declaration that the decree and sale in execution thereof were invalid is maintainable. 13 O.W.N. 1182, P.C. When execution proceedings are taken against the minors as the legal representatives of a judgment-debtor, but the guardian of the minor did not appear at any stage of the proceedings on his behalf the minors are not considered to be parties to the proceedings, being unrepresented, and S. 47 does not bar a suit by him for setting aside a sale effected in such proceedings. 67 I.C. 547. A minor who is not represented in execution proceedings is not barred from bringing a regular suit to set aside a sale in execution of the decree, 28 M.L.J. 525. A minor is not entitled in the execution proceedings to set up the plea that the decree obtained against him is a nullity, being without proper representation. 7 O.C. 199 ; A.W.N. (1905) 122 ; 17 M. 316.

JUDGMENT-DEBTOR OR HIS LEGAL REPRESENTATIVE HAVING TWO CHARACTERS.—If property in the hands of a legal representative is attached or sold and the legal representative objects to the attachment or sale on the ground that the property attached is his own property and does not form part of the estate of the deceased, the legal representative is considered as a party to the suit or a representative of the party to the suit. 63 I.C. 853 (L.) ; 2 R. 168 ; 68 I.C. 369=3 Pat. L.T. 617 ; 39 A. 47 ; 46 I.C. 458=27 C.L.J. 572 ; 6 C.P.L.R. 4 ; 27 C. 34 ; 20 B. 385 ; 28 A. 51 ; 34 B. 546 ; 23 B. 237 ; 14 M. 447 ; 9 B. 458 ; 19 C.W.N. 517=27 I.C. 321 ; 12 A. 313 F.B. ; 5 M. 391 ; 18 W.R. 185 P.C. ; 27 I.C. 321 ; 20 W.R. 162 ; 9 A. 605 ; 7 A. 547 ; 9 B. 458 ; 7 A. 733 ; 28 A. 51 ; 21 A. 323 ; 26 M. 501 ; 7 M. 255 ; 17 C. 711 ; 16 C. 603 ; 23 A.W.N. 208 ; 17 M. 509 ; 16 I.C. 385 ; 88 P.R. 1886 ; 40 P.L.R. 1918=43 I.C. 712 ; 21 A. 323 ; 17 M. 399 ; 14 M.L.T. 137 ; 20 C.L.J. 418 ; 10 M. 117 ; 16 C. 1 ; 3 L.L.J. 406=63 I.C. 853. A contrary view is taken in 39 C. 298 F.B. ; 17 C. 57 ; 20 C.L.J. 485 ; 19 A. 480 ; 47 P.R. 1887 ; 74 P.L.R. 1904 ; 12 P.R. 1887. A question arising under S. 47 would not cease to be such a question, either because the objector was a party before as the legal representative of a deceased debtor or because the objector claimed release of the property as belonging to him in personal capacity and not in a representative capacity. 47 P.R. 1887. Where a decree is obtained against A as the legal representative of the mortgagor, he cannot in the execution object to the sale of the property on the ground that it did not belong to the mortgagor. 32 O. 265. Where a decree is obtained against A as a partner in a firm and he objects to the attachment of property as his personal property, the question is not one under S. 47. 4 A. 190 ; 7 A. 36. A person sued in a representative capacity is a party to the suit. 20 W.R. 162 ; 18 W.R. 185 ; 88 P.R. 1886 ; 17 C. 57 ; 12 A. 313 F.B. ; 5 M. 391 ; 87 I.C. 287=1945 A. 594. When a decree is against two persons the sums payable by each being specified in the decree and a sum of money is attached as the property of both and one of them claims the whole as his own the question is considered as one not between the parties to the suit. 6 A.W.N. 39. A suit by a legal representative of the defendant who purchased the property for

recovery of the same, is barred, 14 A.L.J. 846. When the objection of two Hindu widows to the sale of certain house property without reserving rooms for their residence was disallowed and one of the widows was a party to the suit, the latter was not allowed to bring a separate suit, 134 P.L.R. 1913=19 I.C. 921. When a person's claim is traceable to the same capacity in which he is brought in as the legal representative, the case falls under S. 47, 38 I.C. 360=5 L.W. 158; 87 I.C. 287=1925 A. 594.

Judgment-debtor trustee.—A judgment-debtor claiming as a trustee is not a party to the suit, 19 C.W.N. 910=20 I.C. 790; 67 I.C. 438=3 Pat. L.T. 432; 6 C.W.N. 663; 31 M. 125; 30 M. 26; 27 I.C. 328; 11 P.R. 1887; 29 B. 237; 7 A. 36; 7 A. 547, 747; 16 C. 437; 24 W.R. 365; 26 A.W.N. 157; 23 B. 246; 12 I.C. 411; 14 O.L.J. 428 F.B.; 13 M.L.J. 372; 12 P.R. 1887; 12 A. 313; 23 M. 195 F.B.; 28 B. 458; 12 C.W.N. 308; 35 C. 364; 12 I.C. 163; 28 A. 644; 3 A.L.J. 370; 39 C. 298. 14 O.L.J. 425 F.B.; 12 A. 79; 8 C.W.N. 353; 12 C.W.N. 308; 6 Bom. H.C.R. 205; *contra* in 2 A. 752. When a person is a party to a suit in his personal capacity and also as a representative his objections come within S. 47 as he was a party to the suit, 20 I.C. 790=19 C.W.N. 910. An objection that the decree was obtained against a person who was not the shobait of the temple against whose shobait the decree is to be executed is under S. 47, 11 I.C. 280. When on the death of the judgment-debtor his legal representative is brought on the record and he sets up a title on behalf of a person not a party to the suit, the order on such a petition is not one under section 47, 31 I.C. 393 (23 M. 95 and 39 C. 298, followed.)

DECREE-HOLDER AUCTION-PURCHASER.—According to the view held by the Calcutta, Madras and Bombay High Courts, the decree-holder does not lose his character of a party to the suit merely because he happens also to be the purchaser, 27 C. 34; 26 M. 529; 26 M. 740; 35 B. 452; 31 C. 737; 7 O.L.J. 436; 12 M. 454; (1920) M.W.N. 562; 144 I.C. 563; 13 M. 504; 24 M. 185; 25 M. 529; 13 M.L.J. 237; 28 M. 87; 8 A. 146; 26 A. 447; 3 A.L.J. 234; 6 C.W.N. 190; 6 C.W.N. 283; 78 I.C. 930; 63 I.C. 762; 1926 C. 798; 30 C.W.N. 649 F.B. But see 48 B. 550; 44 B. 977 which approves of the other view. According to the other view held by the Full Bench of the Allahabad High Court and the High Court of the Punjab, the question as to delivery of possession to the auction-purchaser is not one relating to the execution, discharge or satisfaction of the decree within the meaning of S. 47, and the decree-holder after he becomes the auction-purchaser can no longer be said to be a party to the suit, 31 A. 82 F.B.; 8 P.R. 1918; 121 P.R. 1919; 5 O.L.J. 551=48 I.C. 39; (1919) Pat. 354=52 I.C. 711 (30 A. 72 is overruled by 31 A. 82 F.B.). A suit by a decree-holder auction-purchaser to recover possession of the property purchased by him is not barred by S. 47 as the matter does not relate to the execution discharge or satisfaction of the decree, 48 B. 550. The conclusion is the same as in 31 A. 82 F.B. although the reasoning is different. In 44 B. 977 it was held that although the plaintiff remained a party to the suit as against defendant No. 1, yet defendant No. 2, not being a party to the suit, the plaintiff's proper remedy, in order to get possession of the property purchased at the Court-sale, was by filing a suit against both the defendants. Where a Court auction-purchaser surrenders the land to the decree-holder and the latter brings a suit for possession, S. 47 is no bar to a suit as it was not in his capacity as decree-holder but by virtue of surrender that he brought the suit, 63 I.C. 762.

DECREE-HOLDER DEPOSITARY.—When attached property is placed in charge of the decree-holder as depositary and he wrongfully detains the property, a suit against him for damages from wrongful detention is maintainable as the suit is not one as against the decree-holder as such or against a party to the suit, 59 I.C. 477 (N.). A person who claims under a title created by the defendants after the suit was instituted is not a party, 16 W.R. 307. A person who was not on the record when the decree

was passed does not become a party to the suit by applying in execution. 2 O. 327 P.O. ; 3 O. 371 ; 4 C. 209. An execution purchaser is not a party to the suit. 15 B. 290 ; 13 B. 34 ; 13 O. 326 ; 11 O. 150 ; 8 W.R. 304 ; 9 I.O. 472 ; 6 M.L.T. 290. A purchaser *pendente lite* of property in dispute is not a party. 13 M.L.A. 69 P.O. The purchaser of a portion of a decree is not a party, nor the representative of any such party and a separate suit by him for a declaration of his right of purchase after dismissal of his application under O. 21, r. 16, is not barred. 12 O. 105. A bidder at an auction-sale is not a party to the suit, or a representative. 51 I.O. 805. A defaulting purchaser is not a party to the suit or the representative. 7 N.L.R. 134 = 12 I.O. 360. S. 47 contemplates parties to the suit and not parties to the execution proceedings. 52 I.C. 514.

Pulene mortgagee.—Where in a suit for sale on a mortgage of several items a person who was made a party on the ground of his having obtained a previous mortgage of some of the items, objected to the sale of the other items on the ground that he had purchased the same at a revenue sale, *held* that in doing so, he was not a party to the suit. 2 Pat. L.J. 219 = 39 I.O. 656. A partner of the judgment-debtor is not a party to the suit if he is not himself a party to the suit. 36 I.O. 681.

REPRESENTATIVES OF THE PARTIES TO THE SUIT.—The word representative in this section has a much wider meaning than the words "legal representative" in S. 50, C.P. Code. 28 M. 466 F.B. It includes not only heirs and executors but also assignees or legal representatives in the strict sense of the words. 7 O.L.J. 297 ; 9 C. L.J. 485 = 1 I.O. 213. It does not mean the representative of a party to the execution proceedings but the representative of a party to the suit. 9 C.W.N. 276. It means a person who succeeds to the rights of the parties to the suit after the decree is passed. 7 O. 403 ; 12 O. 458 ; 11 A. 74 ; 6 C.W.N. 127 ; 27 O. 670. It includes the assignee or a successor to the interest of a party to the decree. 1926 C. 798 = 30 C.W.N. 649 F.B. (*per* Page, J.)

REPRESENTATIVES OF THE DECREE-HOLDER.—An assignee of the decree is the representative of the decree-holder. 26 M. 264 ; 25 M. 383 ; 2 M. 388 ; 26 O. 280 ; 2 C.W.N. 76 ; 16 A. 483 ; 9 A. 46 ; 1 A.L.J. 561 ; 26 A.W.N. 133 ; 11 B. 506 ; 11 A.W.N. 87 ; 33 O. 857 ; 3 A.L.J. 428 ; 11 C.W.N. 163 ; 2 C.W.N. 176 ; A.W.N. (1891) 87 ; 27 O. 670 ; 28 M. 87 ; 14 M.L.J. 474 (*contra* in 20 A. 539 and 10 M.L.J. 116). A transferee of the decree-holder is his representative. 33 I.C. 71. A transferee of a part of interest in a decree is not the representative of the decree-holder. 28 M. 64. The legal representative of the decree-holder is his representative. 16 M.L.J. 27. A person attaching a decree is the representative of the decree-holder. 15 O. 371 ; 16 M. 20 ; 29 M. 318 ; 6 C.L.J. 141 ; 17 M. 58 ; 17 A. 425 ; 7 I. O. 66 = 20 M.L.J. 524 (*contra* held in 26 A. 138). A devisee of the decree-holder is his representative. 23 B. 536. The purchaser of a property in a suit from the plaintiff who was ordered to redeem the mortgage on that property in favour of the defendant is his representative. 9 B. 141. An assignor of the pre-emptor plaintiff who has paid the amount decreed by the first Court, but not the excess decreed by the appellate Court is a representative of the plaintiff in respect of the recovery of the amount paid. 20 A. 354. The purchaser from the auction-purchaser decree-holder is not the representative of the decree-holder. 64 I.O. 68 = 11 L.B.R. 17. The purchaser of a plaintiff's interest not on the record is not his representative. 12 C. 105 ; 5 A. 94 ; 5 A. 452 ; 10 A. 1 ; 12 M. 511. An auction-purchaser is the representative of the decree-holder for the purposes of restitution of property under S. 144. (1912) M.W.N. 513 = 14 I.O. 836, *contra* held in 20 O.L.J. 57 = 27 I.O. 570 ; 30 A. 379 ; 41 M. 467 ; 25 B. 631 ; 12 P.R. 1919 ; 13 B. 34 ; 15 B. 290 ; 2 M.L.T. 806 ; 31 M. 177 ; 34 M. 417 ; 12 O.C. 175 ; 8 I.O. 429. A benamidar purchaser of the mortgagee in a mortgage decree is not the representative of the decree-holder. 44 B. 352. Where a decree declared the amounts due to the

plaintiff (a subsequent mortgagee) and a previous mortgagee (a defendant), but directed the redemption only of the plaintiff's mortgage and ordered the sale of the mortgaged properties only in the event of the plaintiff's mortgage not being paid and the only right given to the puisne mortgagee was to share in the surplus, if any, out of the sale. *held* that the puisne mortgagee was not entitled to execute the decree and S. 47 had no application in the case and that the puisne mortgagee could bring a separate suit against the mortgagee and the private purchaser of property as the amount was not paid to him. 43 M. 90.

REPRESENTATIVES OF THE JUDGMENT-DEBTOR.—A purchaser, lessee or mortgagee, from a judgment-debtor, of property belonging to the judgment-debtor after attachment in execution of the decree against the judgment-debtor is his representative. 21 A. 20; 28 C. 492; 20 M. 378; 34 M. 450; 44 I.O. 978; 4 M.L.T. 85; 9 C. W.N. 134; 1926 L. 134=6 L. 544. A purchaser at an auction, of the interest of the judgment-debtor is his representative, if the question arising between the party or his representative and the auction-purchaser is one relating to the execution, discharge or satisfaction of the decree. 19 C. 683 P.C.; 2 A.L.J. 265; 19 A. 322; 22 A. 86; 22 A. 108; 24 A. 239; 72 I.O. 862; 23 A. 478; 26 C. 324; 26 C. 326; 32 C. 1031; 9 C.W.N. 134; 26 C. 539; 34 M. 450; 8 I.O. 429; 27 I.O. 570; 14 O.C. 89; 28 A. 337; 6 C. 594; A.W.N. (1908) 157; 3 A.L.J. 234; A.W.N. (1900) 42; 41 M.L.J. 120, *contra* 12 P.R. 1887; 62 I.O. 200; 84 I.O. 265=47 M.L.J. 720. An auction-purchaser is not the representative of the judgment-debtor and he cannot apply under S. 47 to set aside an execution sale. 1923 N. 61; 68 I.O. 629; 34 B. 540; 77 I.C. 256. The purchaser of the judgment-debtor's equity of redemption under a private or judicial sale after the decree for sale on the mortgage suit is obtained or a suit is instituted, is the representative. 22 A. 243; 26 A. 447 F.B.; 24 C. 62 F.B.; 11 C. W.N. 495; 16 A. 286; 26 A. 101; 29 C. 813; 18 M. 119; 8 W.R. 297; 10 W.R. 205; 14 A.W.N. 146; 12 A. 72; 16 A. 284; 20 M. 371; 1 I.O. 213; 41 C. 418; 2 C.W.N. 429; 1 S.L.R. 158; 11 C.W.N. 495, *contra* *held* in 151 P.R. 1890. An heir at law or residuary legatee of the judgment-debtor is his representative. 30 C. 1044. An *ijaradar* of the property of the judgment-debtor is his representative. 28 C. 492. An Official Assignee of the insolvent judgment-debtor is his representative. 28 C. 419, *contra* *held* in 7 A. 752; 30 A. 486; 21 B. 205; A.W.N. (1908) 203. A purchaser with the consent of the Court under O. 51, r. 83, from the judgment-debtor is his representative. 23 A. 116. A widow of a sonless Hindu in respect of his personal property is his representative. 27 M. 186; A.W.N. (1893) 106. The assignee of a purchaser from the judgment-debtor, the purchaser having been considered a representative, is a representative of the judgment-debtor. 10 A. 1. Where a landlord of an occupancy holding obtained a decree for rent against the tenant, an unregistered transferee of the latter into whose hands a portion of the holding had previously passed is a representative of the judgment-debtor. 10 C.W.N. 240; 11 C.W.N. 312, 18 C.W.N. 971 F.B.; 27 I.O. 431. Persons taking the judgment-debtor's share by survivorship in the joint family property are his representatives. 11 C.W.N. 163; 34 C. 642 F.B. A purchaser at auction pending an appeal to the Privy Council is the representative. 28 A. 397; 6 C. 594. A person for whom the predecessor of the judgment-debtor was the benamidar and who is therefore really interested in protecting the property is his representative. 7 O.L.J. 299. A transferee of the judgment-debtor's interest after the Court-sale is his representative. 30 M. 507. A person becoming owner by process of law of property mortgaged to him by deed of conditional sale is the representative. 16 A. 284. The vendee by a private sale of the rights of a mortgagor is his representative. 16 A. 284. A second mortgagee, taking a mortgage during the pendency of a suit on a first mortgage is a representative of the mortgagor. 22 A. 243; 20 M. 378. When a decree is obtained against the widow of A on a tenure executed by A, the reversioners of A who object to the execution against the property of the deceased in their hands after her re-marriage are not

the representatives of the judgment-debtor, 14 P.R. 1913. When the landlord has accepted rent for a long period from the purchaser of a non-transferable occupancy holding, he has a *locus standi* under S. 47 to object to execution proceedings against the original tenant in respect of his holding, 64 I.O. 124. A person becoming owner by process of law, of property mortgaged to him by deed of conditional sale is the representative of the mortgagor, 16 A. 284. The vendee by private sale, of the rights of the mortgagor is his representative, 16 A. 284. A second mortgagee taking a mortgage during the pendency of a suit by the first mortgagee is a representative, 22 A. 243; 20 M. 378. The decree in a suit upon a mortgage against a Hindu widow on whose death *pendente lite* a certain person was substituted on the record as her representative without deciding whether he was a representative would not bar a subsequent suit by such representative to have it declared that the mortgage and the decree concerned only the widow's life interest, 6 C. 777; 17 C. 57 (*contra* in 17 C. 711). An unrecorded co-sharer in a tenancy is not a representative in interest of the recorded tenant, 7 I.C. 769; 15 C.W.N. 512. The vendee of a purchaser in a rent sale of the judgment-debtor's property is not his representative. The transferee *pendente lite* from the defendant is the representative of the defendant and hence an objection to the delivery of possession in execution to the decree-holder and an order of the Court as to removal of obstruction fall under S. 47. (1921) M.W.N. 698. An auction-purchaser after the confirmation of sale is the representative of the judgment-debtor, 42 I.O. 552=(1917) M.W.N. 861. A person who acquired a putni tenure at a sale in execution of a money decree against the putnidar, but did not get his name registered in the landlord's office is a representative of the judgment-debtor, 32 C. 1031. A person to whom a transferable occupancy holding was mortgaged before its sale in execution of a rent decree is a representative, 11 C.W.N. 312; 10 C.W.N. 240. The purchaser at an auction held in execution of a decree against the unregistered transferee of an occupancy holding is a representative of the recorded tenant, 8 C.L.J. 327. A transferee of a mortgagor's interest after the decree for sale with respect to the property is passed, but before the sale of the property, is a representative, 18 C.L.J. 264=21 I.C. 938. The purchaser of a non-transferable occupancy holding is a representative, 18 C.W.N. 1266; 27 C. 431. Subsequent mortgagees who had foreclosed their mortgage of certain property included in a previous mortgage are the representatives of the judgment-debtor, 41 C. 418. An official liquidator is the representative of the judgment-debtor, (1917) Pat. 315=38 I.C. 91. A purchaser from the decree-holder purchaser under a money decree is the representative of the judgment-debtor within the meaning of S. 47, 43 M. 107 F.B. A purchaser of a portion of an occupancy holding without landlord's consent is a representative of the judgment-debtor under S. 47, 42 C. 172 F.B. Where the decree is a mortgage decree, the purchaser from the judgment-debtor is his representative, 34 M. 417. The heir of a judgment-debtor is entitled to object in execution proceedings that the ancestral property in his hands is not liable for a money decree against the deceased on the ground that the debt was not incurred for necessity. A separate suit is barred by S. 47; 243 P.W.R. 1912=13 I.C. 670. A person who claims the property sought to be attached by virtue of an assignment and against the prohibitory order being issued is a necessary party and has a right of appeal, 55 I.C. 175=1 Pat. L.T. 75. But see 43 M. 225. A mortgagee of the *putni* interest is a representative of the judgment-debtor *putnidar*, 1926 C. 356=90 I.C. 955.

THE FOLLOWING ARE NOT THE REPRESENTATIVES OF THE JUDGMENT-DEBTOR.—A purchaser before the decree was passed, or a mortgagee or a transferee before the decree is passed is not the representative of the judgment-debtor, 1 C.W.N. 114; 12 C. 458 P.C.; 7 C. 403; 122 P.L.R. 1917=39 I.O. 772; 56 I.O. 809; 14 P.R. 1912; 34 M. 417; 10 W.R. 205; A.W.N. (1894) 146; 26 A. 101;

28 M. 119 ; 29 C. 813. A representative of a deceased debtor who also became the representative of a stranger objector to attachment is not the representative of the former so far as the property claimed by the objector is concerned. 8 A. 626. A Hindu son or brother is not the representative of the judgment-debtor. 12 B. 80. But as to the liability of Hindu son, see S. 53 of the present Code. A person brought on the record as having realised a part of the assets of the deceased debtor, but not as legal representative is not the representative of the judgment-debtor. 10 A. 479. A creditor who has advanced money for funeral expenses to an executor under the orders of the Court is not his representative. 14 C. 317. A widow of a person who has not properly been brought on the record is not his representative. 13 A.W.N. 106. A person who claims property adversely to the debtor is not his representative. A.W.N. (1906) 62. The purchaser or other transferee of property attached in execution of a simple money decree before attachment is not his representative. 64 P.R. 1912=13 P.W.R. 1912 ; 15 C.W.N. 711=9 I.C. 307 ; 16 A. 286 ; 22 A. 450 ; 17 A. 222. The reversioners of a Hindu against whose widow a decree was passed on a bond alleged to be executed by the husband, the contention being that there was no such debt and the decree was collusive are not the representatives. 75 P.W.R. 1912 ; 30 M. 420 ; 14 P.R. 1913 ; 27 P.R. 1914. The purchaser at a sheriff's sale where his interest is adverse to that of the debtor is not the representative. 27 C. 264 ; 47 I.C. 844. Two attaching creditors of the judgment-debtor when neither of them was a party to the suit brought by the other are not his representatives. 11 C.W.N. 433. A mortgagee who purchases the mortgaged property in execution of his decree on the mortgage is not a representative of the mortgagor so as to be entitled to object to the execution of the decree of another mortgagee on the same property. 20 A.W.N. 42. The next heir of a Hindu widow is not her representative as he inherits the property as heir at law of her deceased husband. 12 C. 458. The transferee of a party pending suit or appeal is not his representative. 7 A. 681. The purchaser at an auction sale who is a stranger to the suit does not by his purchase become a representative to a party to the suit. 9 I.C. 472=4 Bur. L.T. 28 ; 30 A. 379 ; 20 C.L.J. 457=27 I.C. 570 ; 12 P.R. 1919 ; 42 B. 411 ; 34 M. 417 ; 8 I.C. 429. *Contra* held in 9 L.W. 596=50 I.C. 931 ; (1920) M.W.N. 787=59 I.C. 894, where it is held that an auction purchaser in a simple money decree is a representative of the judgment-debtor for the purposes of O. 21, r. 98, C.P. Code. A collusive purchaser of the equity of redemption (the interest of the judgment-debtor) is not a representative of the judgment-debtor. 42 I.C. 1. Rival auction-purchasers of the same property in execution of different decrees are not parties to the suit or their representatives. 25 M.L.T. 153=49 I.C. 629 ; 3 L.W. 377=34 I.C. 759. A purchaser of property not directly mentioned in the decree is not a legal representative of the judgment-debtor. (1916) M.W.N. 287=33 I.C. 84. A benamidar of the judgment-debtor who purchases property at an execution sale and whose application to set aside the sale is dismissed cannot appeal under B. 47. 46 I.C. 748. The purchaser of the whole or a part of an occupancy holding not transferable by custom is not a representative of the judgment-debtor. 3 Pat. L.J. 579=43 I.C. 969. An unrecorded co-sharer in a tenancy sold in execution of a rent-decree against the recorded co-sharer is not a representative of the recorded co-sharer. 15 C.W.N. 512=7 I.C. 769. A purchaser at an execution sale of a mortgage decree is not the representative of the judgment-debtor if he sets up a title adverse to the judgment-debtor. 15 C.W.N. 542=9 I.C. 194. A defaulting purchaser is no party to the suit or a representative and the proceedings cannot be taken in execution against an order against him to make up the deficiency. 7 N.L.R. 134=12 I.C. 360. A transferee from the judgment-debtor during the interval between the first and second attachments, when the first attachment did not revive is not a representative of the judgment-debtor. 44 I.C. 864. A purchaser from the judgment-debtor between the interval of the first and second attachments of the same property when the attachment did not revive is not the representative of the judgment-debtor. 44 I.C. 864.

QUESTIONS RELATING TO EXECUTION.—When the sale of the property attached in execution has been completed and the purchase-money paid into court, nothing remains to be done in respect of the execution of the decree against that property. 23 C. 196. Until the order is passed confirming a sale in execution of a decree, the decree-holder should be considered as executing his decree. 15 W.R. 51.

INCIDENTAL QUESTIONS.—S. 47 does not concern with orders determining incidental questions merely, as to whether proceedings are to be conducted in a certain way or not. The language of the section clearly indicates that the questions contemplated by the section are of a nature such that it is possible to suppose that but for the section they could have formed the subject of determination by a separate suit. 34 A. 530. It is not every order made in execution which is a decree, and an order granting or refusing a process for the examination of a witness or an order merely determining a point of law arising incidentally or otherwise in the course of proceedings and not refusing any reliefs is not appealable under S. 47. 2 L.L.J. 398=56 I.C. 173. No appeal lies against an order on a preliminary point in an execution case. 40 I.C. 517=(1917) Pat. 191. Every judicial order made in execution is not an order under S. 47 of the Code. 10 I.C. 371=14 C.L.J. 35.

DISCHARGE OR SATISFACTION.—Questions relating to discharge or satisfaction must be held to be questions arising in the course of execution or in connection therewith. 24 C. 473; 7 O.W.N. 172; 63 P.R. 1901; 4 A. 420; 31 C. 179; 17 B. 23; 22 B. 475; 6 O.W.N. 796.

TEST.—To find out whether a case is or is not within the section it is necessary to consider what the application was and whether at the time it was one under this section. 31 C. 385; 26 C. 534; 16 O.W.N. 736; 20 C.L.J. 433; 26 C. 449; 38 C. 339. The question whether an order is governed by O. 21, r. 63 or S. 47 depends upon the allegations in the claim petition put in and not on what the court finds in its order to be the real state of facts. Where the claimants allege in their petition that they are trustees for the creditors of the judgment-debtor the application is one under O. 21, r. 58, and where the claimant alleges that he is trustee of the judgment-debtor the application is made under S. 47, O.P. Code. 21 I.C. 748. A claim by a judgment-debtor to property attached in execution of a decree on the ground that he holds it in trust must be preferred under O. 21, r. 58 and not under S. 47 either independently or with other objections. An order passed on such a claim is not appealable even where it purports wrongly to have been made under S. 47. 28 M. 195; 38 I.C. 152; 12 I.C. 411. Whether an order in execution proceedings is within the scope of S. 47 depends upon its nature and contents. If it decides a question relating to the execution, discharge or satisfaction of the decree, and if the decision has been given between the parties to the suit or their representatives in interest, the order of the Court falls within the scope of S. 47 and is a decree within the meaning of S. 2 (2), O.P. Code. 16 O.W.N. 736=13 I.C. 365; 13 C.L.J. 257. 14 C.L.J. 489. Section 47 contemplates that there must be some question in controversy in execution which has been brought to a final determination so as to be binding upon the parties to the proceeding and which must relate to execution, discharge or satisfaction of the decree. 9 A. 500; 23 M. 195 F.B.; 17 M. 399; 22 A. 86. When a person not claiming to be a party to the suit preferred an objection to the attachment of certain property in the capacity of a stranger to the suit and the objection was dismissed on the ground that he was a party to the suit held that the remedy of the objector is to file a regular suit to establish his right to the property attached, and not to proceed by appeal. In such cases the test is whether the claim as laid by the objector is adverse to the claim of the judgment-debtor, and an objector claiming under a paramount title is not deprived of his ordinary

remedies of a regular suit merely because his objection was dismissed on the ground that he is held to be a party to the suit. 47 I.O. 904.

Adding unnecessary parties.—A plaintiff cannot evade the section by adding unnecessary parties. 8 O. 402. When the objections of a representative of the judgment-debtor were dismissed he cannot afterwards bring a suit raising the same objections making two other persons parties only to avoid the bar of S. 244 old Code (corresponding to S. 47 new Code), there being no foundation by reliable legal evidence for making new parties to the suit. 30 M.L.J. 238 P.O. = 32 I.O. 354 P.O. P mortgaged his property twice to K and then to G and then to K again. K sued P and G on his two earlier mortgages and obtained a final decree. During the pendency of K's suit, G sued P and K on his mortgage and obtained an *ex parte* final decree. On G's application for execution of his decree, K lodged an objection on the ground that he was the owner of the property on a title prior in time to G's mortgage it was held that K's objection was not under S. 47 by a party to the decree but under O. 21 r. 58 by a stranger and that it was a direct attack on G's decree for the sale of the property. 80 I.O. 626.

QUESTIONS RELATING TO THE EXECUTION, DISCHARGE OR SATISFACTION OF THE DECREE.—These questions may conveniently be dealt with by considering them under the various provisions of the C.P. Code relating to execution.

SECTION 36.—The question whether the provisions of the C. P. Code relating to the execution of the decrees shall, so far as they are applicable, be deemed to apply to the execution of orders, is one under S. 47.

SECTION 37.—The question, whether a Court is a Court that passed the decree or not, arising between the parties to the suit or their representatives, is one under S. 47.

SECTION 38.—The question whether a Court has jurisdiction to execute the decree or not falls under S. 47. The order refusing executing of a decree is triable only by the executing Court and not by a separate suit.

SECTION 39.—The question whether a Court can transfer the decree for execution under certain circumstances or not, is one under S. 47 and an order refusing transfer or ordering transfer is one under S. 47. 8 C.W.N. 575 ; 24 O. 244. An appeal therefore lies against an order rejecting such an application. 26 O. 250 ; 24 C. 244 ; 8 C.W.N. 575.

SECTION 40.—Whether the Court to which the decree is transferred for execution can execute it falls under S. 47.

SECTION 42.—An order refusing or granting execution is one under S. 47. 40 I.O. 549 ; 25 O. 872 ; 12 A. 579 ; 7 B. 301 ; 37 M. 29 ; 52 I.O. 386. An order that a commission be appointed for partition is one under S. 47. 37 M. 29. Orders refusing execution on the ground that the Court which passed the decree had no jurisdiction fall under S. 47. 28 B. 378.

An order rejecting as time barred an application for the appointment of a Commission to effect partition is appealable. 28 M. 127.

SECTION 43.—The question whether a Court has power to execute a foreign decree transferred to it falls under S. 47.

SECTION 45.—The question whether a precept should issue or not and the order issuing or refusing a precept come under S. 47.

SECTION 48.—An order directing execution to issue against a judgment-debtor is a final order and is appealable under S. 47. 26 I.O. 866=19 C.L.J. 581. The question whether execution is barred or not is one relating to execution.

An enquiry whether the application is a fresh application.—Questions whether an application is one for execution of the decree or one to revive proceedings suspended but not finally disposed of must be decided in each case with reference to the particular facts. 106 P.R. 1894. When a decree-holder is opposed by the debtor in taking out execution and the former imputes fraud to the latter, it was held to be a question arising under S. 47. 10 W.R. 144.

SECTION 49.—Rights of a transferee to execute a decree are governed by S. 47 and an order determining such a right is appealable.

SECTIONS 50 and 53.—The question whether a person is a representative of a deceased party must be decided in execution proceedings and not by a separate suit. 21 A. 323 ; 70 P.R. 1897 ; see also S. 47 (3) ; 2 M.L.T. 207 ; 18 W.R. 185 ; 11 B.L.R. 149 ; 11 O.W.N. 653 ; 5 C.L.J. 491 ; 47 P.R. 1387 ; 147 P.R. 1907 ; 34 C. 642 ; 243 P.W.R. 1912. Questions as to the liability of property in the representative's hands are under S. 47. 243 P.W.R. 1912 ; 34 C. 642 ; 147 P.R. 1907. The question whether the property against which execution is sought in such representative's hands was in fact the property of the deceased and not the separate property of the representative must be decided under S. 47, and not by a separate suit. 21 A. 323 ; 7 A. 733 ; 12 A. 313 F.B. ; 23 A. 51 ; A.W.N. (1903) 208 ; 7 M. 255 ; 17 M. 399 ; 14 M.L.J. 137 ; 17 C. 711 (F.B.) ; 16 C. 603 ; 20 W.R. 280 ; 7 A.W.N. 193. Questions relating to the immorality of the debt are within S. 47. 33 C. 676 ; 20 B. 385 ; 33 B. 39 ; 6 I.O. 582. Under the old Code a suit by the decree-holder against the sons of the judgment-debtor, a Hindu father, after a claim by them to the property attached was allowed, was not barred by the provisions of S. 47, as the duty of a son to discharge his father's debt out of his own share in ancestral property was not a matter which could be decided under the section. 11 M. 413 ; 13 M. 265 ; 16 A. 449 ; 105 P.R. 1900 ; 29 A. 544. But see now S. 53 of the present Code which makes the point clear and the above view is no longer good law. A mortgagee is entitled to execute his mortgage decree against a successor of the judgment-debtor, even when he holds the property by survivorship under the Mitakshara law, without bringing a suit for a declaration that the property in his hands is liable to be sold in execution of the mortgage decree. It is open to the representative to take the very defences in execution proceedings which he might have taken in a fresh suit. 33 C. 676. An objection by the heirs of the deceased that ancestral property is not liable to attachment in execution of the decree against the deceased judgment-debtor on the ground that the debt was not incurred for necessity falls under S. 47. 243 P.W.R. 1912=13 I.O. 670. Where the heir and representative of a deceased judgment-debtor, being himself a judgment-debtor, under the same decree, objects to the attachment of the property of the deceased on the ground that the objector has a lien upon it, the matter falls under S. 47. 20 P.L.R. 1903 ; 73 P.L.R. 1904. The mere fact that the decree-holder had been ordered to pay the fee of the guardian who represented the minor judgment-debtor could not be regarded as an adjudication upon any question arising between the parties. 2 Pat. L.R. 222=84 I.O. 576. A question whether property attached and sold in execution formed part of the widow's estate or belonged to the estate of her husband must be determined in execution. 1 I.O. 60 ; 8 O.O. 405. A reversioner's objection to attachment cannot be tried under S. 47. 30 M. 402. A decision as to whether a property standing in the name of the legal representative of a deceased judgment-debtor and attached in execution of a decree obtained against the latter formed a part of the estate of the deceased is appealable under S. 47. 17 C. 711 ; 20 O.L.J. 485 ; 22 C.L.J. 304=31 I.O. 321. An executing Court is bound before granting substitution as a legal representative to decide whether an alleged

legal representative, who denies his liability to satisfy the decree is the heir of the deceased judgment-debtor and therefore bound by the decree. 82 I.C. 803=3 P.L.T. 106. An objection of one of the heirs of the judgment-debtor brought on the record after his death, to the effect that he was not liable to satisfy the decree passed against his brother must be decided by the executing Court. 1921 Pat. 293. The order of the Court, to which a decree is sent for execution to bring the legal representative on the record is not liable to be set aside by a regular suit. 38 M. 1076. Where in a suit objection is taken by a legal representative of a deceased judgment-debtor that the proper method of procedure against him was to proceed by way of execution in the Court which passed the decree under S. 50, C.P. Code; the Court to which a decree has been transferred for execution cannot cure the defect by treating the suit as a proceeding in execution under S. 47. 23 M.L.J. 287=17 I.C. 293. Questions whether improvements on land attached in execution were property of the deceased judgment-debtor or of his representatives in their own rights come under S. 47. 26 M. 501. An objection that certain property is held by the representative not as a representative but as his own property falls under S. 47. 17 C. 711 F.B.; 16 O. 1; 10 M. 117; 22 C.L.J. 304; 20 C.L.J. 481; 16 M. 447; 9 B. 458; 9 A. 605; 22 B. 237; 7 A. 547; 6 C.P.L.R. 4; 27 C. 34; 20 B. 385; 15 O. 437; 17 I.C. 126; 7 I.C. 457; 20 P.L.R. 1903; 73 P.R. 1904; 16 I.C. 385. An objection that the legal representative holds the property in trust and that it is not the judgment-debtor's property is not under this section. 28 A. 644; 3 A.L.J. 370; 23 B. 237; 15 O. 437. The question of the binding nature of the debt of a Zamindar under the Madras Impartible Estates Act, on the succeeding Zamindar for a sum of money borrowed for the benefit of the estate cannot be decided in execution of the decree against the deceased Zamindar, as it is one for enforcing a new liability created against the estate by virtue of the provisions of the Act. The proper remedy is to have the declaratory decree and to apply to have the decree executed against the property. 83 I.C. 165=46 M.L.J. 374.

SECTION 51.—An order granting execution and the mode of execution fall under S. 47 and are appealable. An order negating the right of the decree-holder to proceed against the property of the judgment-debtor is one under S. 47. 2 L. L.J. 398. An order appointing a receiver is one under this section. 5 B. 45. The question as to the discharge of a receiver appointed in the execution proceedings relates to execution and falls under S. 47, C.P. Code, and the order on such a question is appealable. 3 Pat. L.T. 513.

SECTIONS 52 AND 53.—Questions under S. 52 fall under S. 47. 20 W.R. 280. S. 47 is a bar to a suit, by a legal representative, of the debtor, against whom a decree was passed, to recover possession of property sold in execution of the decree. 39 A. 47. A decree for sale on a mortgage was passed against one R who died and her legal representatives were brought on the record and a decree absolute was passed against them. The decree against them was amended and the parties submitted to the order. On an application for execution it was held that the amended decree operated so as to throw upon the decree-holder the burden of proving in the execution department that the property sought to be sold was in the hands of the persons as the legal representatives. 18 A.L.J. 131=55 I.C. 83. Where in execution of a decree against a deceased person's estate in defendant's hands, certain fields are attached as belonging to the estate, and a claim preferred by the defendant is allowed in respect of some of the fields only, a regular suit does not lie to remove the attachment. 17 B. 49; 6 Bom. L.R. 697.

SECTION 53.—S. 53 is new in the present C.P. Code. It has been added in order to set at rest a question on which, the High Courts were divided in opinion. Under the old Code it was a debateable point whether the creditor could follow the ancestral property in the hands of the son or grandson in execution. Under the present Code it is enacted

that any controversy between the parties with regard to the liability of the son or grandson to pay the debts of his ancestor should be determined in execution, it being open to them to raise any objection or defence in such proceedings, which they might have raised in a separate suit instituted by the creditor. See the Report of the Special Committee. 3 I.C. 763=11 Bom.L.R. 699. Questions as to the immorality of a debt contracted by a Hindu father upon which a decree was obtained is one relating to execution. 33 C. 676. The question whether a decree against a Hindu father is capable of execution, the debt being tainted with immorality, is one relating to the execution of the decree. 62 I.C. 905 (P.).

SECTION 54.—If any party feels aggrieved at the Collector's partition, his remedy is to approach the executing Court. It is not open to him to question the Collector's action by a separate suit. 5 Bom.L.R. 648; 126 P. R. 1879. An appeal lies according to the revenue law of the particular local area. 73 P.R. 1889.

SECTION 55.—An order issuing a warrant of arrest is one falling under S. 47 and is appealable as a decree. 73 I.C. 766. An order refusing to release the judgment-debtor is not one under S. 47 and hence not appealable. 55 P.R. 1886. An order relating to imprisonment of the judgment-debtor relates to execution and falls under S. 47 and hence is appealable. 69 P.R. 1895; 22 P.R. 1871. An order directing the release of the judgment-debtor arrested in execution falls under S. 47. 21 M. 29. An order refusing execution simultaneously against the person and property of the judgment-debtor is appealable under S. 47. 7 B. 301. An order under sub-S. (4) rejecting an application for forfeiture of a security bond is appealable under S. 47. 34 I.C. 247=10 Bur.L.T. 15. An order refusing to discharge a surety under this section from liability is not appealable. 143 P.R. 1908; 15 A. 183. An order refusing recovery of the amount decreed from a surety is not appealable. 72 P.R. 1902.

SECTION 56.—The question whether a woman is liable to arrest in execution of a decree is under S. 47.

SECTION 60.—Questions relating to attachment or sale are within S. 47. 8 C. 28 P.O.; 24 C. 473; 7 O.P.L.R. 14; 9 C.L.J. 358. Questions regarding liability to attachment and sale arising out of S. 60 are such questions. 8 A. 146 F. B.; 1 P. L. T. 267=56 I.C. 646; 57 P.R. 1897; 19 B. 328; 17 I.C. 126; 14 M.L.J. 137; 27 M. 658; 16 C. 603; 16 C. 1; 6 A. 393; 6 A. 448; 10 A. 570; 1926 P. 202=4 P. 496. An order in execution that no warrant shall issue before a certain date for attachment of the judgment-debtor's property does not fall under S. 47. 64 P.L.R. 1911=9 I.C. 823. An order that a fresh attachment is not necessary is not appealable under S. 47. 34 A. 530. Objections to attachment by parties to the suit must be decided in execution proceedings. 20 P.L.R. 1903. A judgment-debtor whose claim to attached property, on the ground of its being his service *vatan* is rejected, cannot bring a regular suit for a declaration that the property was not liable to attachment. 19 B. 328. The claim of a judgment-debtor that the decree holder took away certain jewels in execution of his decree without mentioning the same in the attachment list falls under S. 47. 14 M.L.J. 295; 23 M. 55. A separate suit does not lie for value of crops out while under attachment. 2 O.C. 315. The S. 47 does not apply when the objector to attachment is not a party to the suit. The law is provided in O. 21, rr. 58-63. The question whether any property is not liable to be sold in execution must be determined in execution. 16 C. 603; 27 C. 187; 26 C. 727. Questions relating to the liability of land to be sold under S. 9, N.W.P. Rent Act, fall under S. 47. 6 A. 393. A judgment-debtor's objection that the property was held by him in trust does not fall under S. 47. 10 M.L.J. 85; 10 M.L.J. 64. A reversioner's objection to attachment cannot be tried under S. 47. 30 M. 402. When the judgment-debtor seeks to set aside the sale on the ground that the holding was not transferable, the

application is one under S. 47. 7 I.C. 48 ; 26 O. 727 ; 3 O.W.N. 586. An objection to attachment by the judgment-debtor that he has no saleable interest in the property falls under S. 47, and the order of dismissal is appealable. 85 I.C. 997=28 O.O. 175.

Fresh attachment.—An order disallowing the objection of the judgment-debtor that a fresh attachment is necessary is not appealable. 34 A. 530.

SECTION 63.—A property of a judgment-debtor was attached at the instance of two judgment-creditors by the District Judge as also by the Subordinate Judge. The Subordinate Judge having regard to the provisions of S. 63 then declared to proceed with the application of the attaching creditors for sale of the property and being of opinion that proceedings should be taken in the Court of the District Judge dismissed the execution case pending on his file ; held that the order passed by the Subordinate Judge was one relating to execution within S. 47 and as such was appealable. 26 C.L.J. 42=42 I.C. 466.

SECTION 64.—A suit by an attaching creditor to avoid an alienation is not maintainable. The matter relates to execution. 28 O. 492.

SECTION 66.—The question whether the decree-holder is only a nominal decree-holder for the benefit of somebody else cannot be investigated in execution. 3 M.L.J. 220. S. 47 did not apply in cases in which the decree or purchase is made *benami* and a suit lay to set it aside. 17 O. 769 F.B.

SECTION 68.—In an execution proceeding transferred to a Collector under S. 68, the property attached was also sold at auction and purchased by the decree-holder. After the confirmation of sale the judgment-debtor can apply to set aside the sale on the ground that the decree-holder fraudulently kept them in ignorance of the pendency of the execution proceedings. A separate suit is barred by S. 47. 35 I.C. 473.

SECTION 72.—An order refusing to arrange for temporary alienation under S. 72 is one under S. 72 and appealable. 52 I.C. 386.

SECTION 73.—An order under S. 73 cannot be said to be one under S. 47, if the question determined by the order arose between the rival decree-holders to which the judgment-debtor had no interest. 42 O. 1 ; 23 I.C. 422 ; 57 I.C. 421=5 Pat. L.J. 415 ; 36 C. 130 ; 12 I.C. 911 ; 42 M.L.J. 473=67 I.C. 546 ; 14 A. 210 ; 32 M.L.T. 155 ; (1921) Pat. 204 ; 12 Bom. L.R. 365 ; 22 M.L.T. 70 ; 9 W.R. 514 ; 15 M.L.T. 32. If the question arose not only between the rival decree-holders but also between the judgment-debtor on the one hand and the decree-holders on the other such question comes within the scope of S. 47. 36 B. 156 ; 29 I.C. 231=(1915) M.W.N. 334 ; 39 M. 570 ; 37 I.C. 900=31 M.L.J. 820. When the objection to the order under S. 73 is based on the invalidity of the execution application or on the character of the fund in Court the question is between the judgment-debtor and the individual creditor and the decision on it is really one under S. 47. 37 I.C. 900=31 M.L.J. 820. An order under S. 73 is not appealable unless it also comes under S. 47 and satisfies all the requirements thereof. 51 O. 761. Where one creditor attaches property and other creditors who have applied for rateable distribution have got the property sold, the order dismissing the application of the judgment-debtor to set aside the sale determines a question relating to execution and falls under S. 47. 36 B. 156. Questions between several mortgagees of property as to the distribution of sale proceeds of the property does not fall within S. 47. A.W.N. (1907) 201=4 A.L.J. 492. When one of several decree-holders agreed to pay the others their share of the decretal debt as a share for a sale of land to him, but failed and the others executed the decree and sold the judgment-debtor's property it was held that an application to set aside the sale will not lie under S. 47, but a suit would be maintainable. 74 I.C. 351=1923 A. 573.

SECTION 135.—An order for an arrest in execution of a decree is one in execution under S. 47 and an appeal challenging its validity lies. 47 M.L.J. 678=84 I.C. 519. An order under S. 135 claiming exemption from arrest is one relating to execution of the decree and an appeal lies therefrom. 5 I.C. 909=20 M.L.J. 196.

SECTION 144.—An application under S. 144, C.P. Code for mesne profits by way of compensation relates to the execution, discharge or satisfaction of the decree. 18 N.L.R. 15=67 I.C. 225; *contra* in 82 I.C. 321. When a suit is brought for restitution in spite of the provisions in S. 144, it is open to the Court to treat the suit as a proceeding in execution in the exercise of its powers under S. 47 (2). 13 B. 485; 1922 N. 198=67 I.C. 319; 25 A. 441; 45 B. 1137; 28 M. 355. An order under S. 144, C.P. Code, is not an order in execution falling under S. 47. 22 A.L.J. 881=82 I.C. 321. Where the judgment-debtors apply for restitution of the property purchased by the auction-purchaser on the ground that the decree-holder had sold certain property not covered by the decree, the application is not maintainable under S. 47. 45 A. 96. An order awarding profits to the judgment-debtor as against the auction-purchaser in connection with restitution is appealable. 20 N.L.R. 170=79 I.C. 636. Under the corresponding section of the old Code the bar created by S. 47 did not apply. 35 C. 265; 49 P.R. 1896; 24 A. 288; 14 C. 605; 4 C. 625; 24 A. 361; 7 A. 170 F.B. Proceedings for restitution of property taken in execution of a decree subsequently set aside are not under S. 47. 35 C. 265; 26 I.C. 890=19 C.W.N. 1167; 28 C.W.N. 988. The remedy of a person entitled to a refund in consequence of the reversal or modification in appeal of a decree passed by a Revenue Court is both an application and a suit. 26 A. 149; 15 C. 179. A decree on an application for restitution (in order to be appealable) must be a decree on the merits of the application and not on the question incidentally arising out of or collateral to the application. So an order that an application is not barred by limitation is not appealable under S. 47. 110 P.R. 1913. Ss. 47 and 144 must be read together. The word parties in S. 144 must be taken to include their representatives. "Representative" does not mean only a purely legal representative, but it means representative in interest and includes a purchaser of his interest so far as such interest is concerned and is affected by the decree. (1918) Pat. 243=46 I.C. 465. Restitution of property taken in execution of a decree when the decree is amended relates to the execution of the decree. 27 A. 485; 22 A. 79 F.B.; 5 C.W.N. 627; 25 A. 441; 2 W.R. 275; 16 M. 287; 4 W.R. 66; 19 W.R. 413; 4 B.L.R. App. 64; 22 A. 108; (*contra* in 1 A. 388; 13 M. 437; 7 A. 432). Questions relating to restitution fall under S. 47. 40 M. 299. An order for restitution falls under S. 47. (1912) M.W.N. 513=14 I.C. 836; 39 A. 339; 45 I.C. 608; 43 B. 235; 28 A. 665; 29 A. 348; 25 A. 441; 2 A. 61; 7 A. 432; 24 A. 291; 4 Bom. L.R. 64; 4 C.L.R. 577; 2 W.R. 275; 4 W.R. 66; 15 W.R. 160; 19 W.R. 413; 10 B.H.O. 297; 72 I.C. 879; 13 M. 437 (*contra* in 3 C. 30 F.B.; 22 C. 501; 13 C. 326).

SECTION 145.—LIABILITY OF SURETY.—An order discharging or refusing to discharge a surety from liability under a bond executed in the terms of S. 55, C. P. Code, is not appealable. 58 P.L.R. 1902; 15 A. 183; 15 C. 171; 8 P.R. 1903; 72 P.R. 1902. A surety against whom an order is made and sought to be enforced under S. 145 has a right of appeal from an order made against him. 12 B. 71; 8 W.R. 24; 9 B.H.C.R. 119. An order directing a surety to pay the amount of the decree is appealable but is not a decree otherwise. 39 I.C. 648=3 P.L.W. 414. See 24 I.C. 474=27 M.L.J. 112. An order requiring a surety for a receiver to pay up any money due, under S. 145 of the C. P. Code can be executed and is one under S. 47. 13 Bur. L.T. 91; 59 I.C. 844. Security bonds hypothecating immoveable property as security for the due performance of a decree can be enforced in execution without a separate suit for sale. 45 A. 649. The liability of a surety under his bond for the performance of any decree or for the restitution of any property taken in execution of a

decree can be enforced by a separate suit. It is not necessary to resort to execution alone. 36 B. 42. A third party who has given security on behalf of a judgment-debtor for the due performance of a decree has no independent right of application under S. 47 and cannot therefore apply to the executing Court to cancel the security bond on the ground that it was obtained by fraud. His only remedy is by way of a separate suit. The effect of S. 145 is that the surety may be made a party to the execution proceedings against the principal debtor and an order against the surety is in effect a decree upon his separate contract against him for the payment of money. The surety is not a party to the suit or to the decree made therein, nor does he become a party to the execution proceedings until application is made for an order against him. S. 145 only makes him a party for a limited purpose, namely for appeal. 43 M. 325. A surety cannot bring a suit for a declaration that the decree-holder cannot execute a portion of the decree against him. 28 M. 117. A security bond cannot be enforced in execution. 22 C. 25. An order for the arrest of a surety passed by an ordinary Court in execution of a Small Cause decree transferred to it for execution is appealable. 20 C.L.J. 129=27 I.C. 10. An appeal lies against the surety by a third person to enforce the security bond. 26 I.C. 76=(1914) M.W.N. 714.

SECTION 148.—An order extending time under S. 148 of the O.P. Code is not appealable. 11 A.L.J. 950 ; 31 I.C. 240 ; (But see 14 A. 520) ; 22 C.L.J. 299.

SECTION 151.—Proceedings in execution of an order concerning costs of a commission are under S. 151 and do not fall under S. 47. As such there is no appeal therefrom. 74 I.C. 186. An order for restitution under S. 151 under the inherent powers of the Court and not under S. 144 is not appealable. 39 I.C. 763 ; 10 P.R. 1914 ; 19 I.C. 499=172 P.L.R. 1913.

ORDER 21, R. 1.—The executing Court has jurisdiction to entertain an application for a refund of the money deposited by a judgment-debtor under O. 21, r. 1, when another judgment-debtor had already paid the amount to the decree-holder, and the payment was certified. 65 I.C. 307=3 Pat. L.T. 754. Questions between the decree-holder and the third person as to the money deposited in the treasury do not come under S. 47. 6 A. 12 ; 19 C. 286.

ORDER 21, R. 2.—The judgment-debtor cannot bring a suit against the decree-holder for a declaration that the decree has been satisfied out of Court and for an injunction restraining him from executing the decree. 36 I.C. 986, 988 ; 28 I.C. 468 ; 21 C. 437 ; 22 B. 463 ; 31 C. 480 ; 10 B. 155 ; 20 A. 254 ; 22 I.C. 963 ; 50 I.C. 956. The view taken by the Punjab High Court was contrary and it was held that a suit for a declaration that a decree obtained against the plaintiff and others has been satisfied as regards the plaintiff and hence cannot be executed against him is maintainable. Neither S. 47 nor O. 21, r. 2 is a bar to such a suit. 42 P.R. 1914 ; 16 P.R. 1910. But see now 3 L. 319 F.B. taking the view of the other High Courts. But the judgment-debtor can sue the decree-holder for damages for breach of contract in such cases. The question in such a suit is not a question relating to execution, discharge or satisfaction of the decree, but whether the decree-holder agreed to accept a certain sum in full satisfaction of his decree, and if so what are the damages sustained by the judgment-debtor by reason of the breach of contract. 28 B. 394 ; 26 C. 718 ; 21 M. 409 ; 22 I.C. 963 P.C. ; 28 I.C. 488=7 L.B.R. 367 ; 23 I.C. 405=(1914) M.W.N. 174. An order under O. 21, r. 2 refusing or allowing an application for certifying a payment alleged to have been made to the decree-holder out of Court is appealable. 68 I.C. 645=1 P. 644 ; 18 M. 26 ; 11 B. 57 ; 16 A. 129 ; 7 C.W.N. 172 ; 18 C.W.N. 27. If the adjustment of a decree out of Court has not been certified as required by O. 21, r. 2, the Court executing the decree cannot take notice of it. In such a case it is not open to the Court to investigate under S. 47 allegations of fraud made by the judgment-

debtor against the decree-holder. 16 O.W.N. 23=13 I.C. 67. An allegation that an adjustment of a decree out of Court is fraudulent must be gone into and decided by the Court in execution. 41 A. 443; 30 C.L.J. 278=53 I.C. 67. When the decree-holder purchaser compromised with the judgment-debtor to give him time to pay off the debt before he would apply for delivery of possession but notwithstanding he applied for delivery of possession *held* that the question of compromise was triable by the executing Court and an appeal lay from the order. 13 O.W.N. 27=20 I.C. 874. An application by the judgment-debtor for certifying payment by him to the decree-holder out of Court relates to execution, etc., and falls under S. 47. The dismissal of such an application is appealable. 3 P.L.T. 487=68 I.C. 645. O. 21, r. 2, does not in any way limit or affect the operation of S. 47, and does not prevent the Court from investigating a question of fraud on the part of the decree-holder in omitting to certify satisfaction of a decree. 68 I.C. 924=11 L.B.R. 363. An order passed under O. 21, r. 2, refusing the application of the judgment-debtor to record an adjustment of the decree out of Court is one under S. 47 and as such appealable. 16 A. 129; 5 M.L.J. 140; 18 M. 26. An appeal lies from an order dismissing or rejecting an application for re-opening the case by cancelling the *ex parte* order, certifying payment by the judgment-debtor. U.B.R. 1897—1901. Vol. II, 254. It is not open to an executing Court to investigate the fact of receipt, of the decretal amount or of the adjustment of the decree out of Court in the execution proceedings. By reason of the special provisions of r. 2, the determination of this question has been taken out of the purview of S. 47. 135 P.R. 1919; (27 C.L.J. followed, *contra* in 34 B. 575). When the attaching creditors have been made parties to the decree-holder's application for entering up satisfaction the question that arises between them is one falling under S. 47 and an appeal lies from an order thereon. 24 M.L.T. 495=48 I.C. 109. A suit for the recovery of the amount not certified to the Court is barred by S. 47. 6 B. 146; 83 P.R. 1884; (8 C. 402 even when an unnecessary party is added). In execution of a rent decree a certain holding was advertised for sale. Subsequently a petition was filed purporting to be made by the decree-holder certifying that he had received payment in full and praying for dismissal of the execution case on full satisfaction. The decree-holder afterwards put in a petition praying that the order of dismissal should be cancelled on the ground that the certificate was a forgery and that the execution case should be allowed to proceed. The petition was rejected on the ground that the decretal money had really been paid. The order was held to be under S. 47 and an appeal lay therefrom. 40 I.C. 839=26 C.L.J. 317. An appeal from an order passed in execution proceedings under O. 21, r. 2 of a Small Cause Court does not lie. 42 I.C. 467=3 P.L.W. 146.

A suit to set aside a sale held in execution of a decree for money which was paid but uncertified would lie on the ground of fraud. 9 C. 788; 10 C. 354; 20 A. 254. But see 13 I.C. 67, mentioned above. A suit to recover payment made not directly towards satisfaction of a decree lies. 1 M. 203. A suit by a surety, who had paid the amount to the decree-holder, against the judgment-debtor, is not barred when based on the plea of an uncertified adjustment. 12 B. 235. A suit on the basis of an uncertified payment by means of a bond is maintainable. 10 M.L.J. 213. An application by the decree-holder, denying the genuineness of the application certifying satisfaction of the decree and asking that the order passed thereon should be cancelled and the execution case allowed to proceed must be treated as one falling under S. 47, although it purported to be presented under O. 47, r. 1. An appeal therefore lies from the order on such an application. 26 C.L.J. 317=40 I.C. 839. When the judgment-debtor had arranged with his bank to pay off the decretal amount and enter up satisfaction which it failed to do; and subsequently the bank got an assignment, of the decree recognised by the Court and executed the decree and realised the amount, *held* that a suit by the judgment-debtor to recover the amount realised in breach of the

contract was maintainable and that S. 47 of the C.P. Code was no bar. (1917) M.W. N. 359—40 I.C. 549. Questions of adjustment after decree absolute for sale fall under S. 47. 12 O.W.N. 282.

ORDER 21, R. 6.—An appeal lies from an order directing or refusing the issue of a certificate under this rule. 6 N.W.P. 73.

ORDER 21, Rr. 7—9.—See S. 42 *supra*.

ORDER 21, R. 15.—An order disallowing execution to one of the decree-holders is not under S. 47. 23 B. 623; 17 W.R. 415; 5 C. 592; 17 W.R. 136. The order protecting the interests of non-applying decree-holders is not appealable under S. 47. 5 C. 592; 2 M.L.T. 307. (The contrary view was held in 17 M. 394 in which case an appeal was held to lie on the ground that the question was one between the decree-holder on the one hand and the judgment-debtor on the other who objected to the execution by one of the several decree-holders. If the judgment-debtor's objection to execution is allowed, the decree-holder may appeal and if it is disallowed the judgment-debtor may appeal. 17 M. 394; 28 P.R. 1898; 70 I.C. 329—32 M.L.T. 118. Disputes among co-decree-holders as to the right of one to execute a joint decree to the exclusion of the other are not under S. 47, as not arising between parties to the suit. 70 I.C. 329; 17 W.R. 136. Questions as to part satisfaction of the decree cannot be raised in a separate suit. 8 C. 402. The question whether a certification by one was in fraud of other creditors falls under S. 47. 12 C.L.J. 566. An order of a judge of the High Court presiding over the Privy Council Department, rejecting an application for execution is a judgment within the meaning of S. 15 of the Charter and is therefore appealable. 6 C. 594.

ORDER 21, R. 16.—Any question between the transferee of the decree-holder and the judgment-debtor falls under S. 47. 2 A.L.J. 285; 28 I.C. 906 (M.); 9 B.H.C. 49; 11 B. 206; 26 A. 613; 1 A.L.J. 61; 16 A. 483; 16 M.L.J. 27; 78 I.C. 495; 70 I.C. 329; 26 M. 264; 25 M. 383; 12 C. 610; 9 A. 46; 25 A. 443; 27 C. 670; 20 A. 539; 25 M. 545; 4 M. 285; 28 M. 64; 78 P.R. 1896; 2 A. 91; 2 L.W. 109. An appeal lies from an order of a Court dismissing an application for the execution of a decree made by a person who claims to be a transferee of the decree. 16 A. 483. An order refusing to recognise the transferee of a decree, or dismissing his application for execution on the objection of the judgment-debtor is one under S. 47. 16 A. 483; 25 A. 443; 27 C. 670; 25 M. 383; 6 I. C. 199—8 M.L.T. 56. An order recognising a transfer of the decree is one under S. 47. 2 L.W. 109—26 I.C. 944; 9 B.H.C. 49. An order of the executing Court determining whether an alleged transferee from the decree-holder is or is not the decree-holder's representative is an order under S. 47. 27 C. 250; 26 C. 250. A transferee of a decree whose application is rejected under O. 21, r. 16, on the ground that the transfer is not a valid one is not precluded from instituting a regular suit for a declaration as to the validity of the transfer, as such a question is not one between the parties to the suit and does not relate to execution of the decree. 26 M. 264; 11 C. 393; A.W.N. (1896) 201 9 C. 371; 26 Bom. L.R. 333—80 I.C. 249 (*contra* in 11 B. 506). An order disallowing the petition of the assignee on the ground that he acquired only a partial interest in the decree is not appealable and a suit lies to enforce his right. 28 M. 64. An order under O. 21, r. 16, refusing to execute a decree assigned by the decree-holder on the ground that the decree had been satisfied by payment to the original decree-holder fell under S. 47 and an appeal and a second appeal lay therefrom. 4 C.P.L.R. 132. A person beneficially entitled under a decree whose application under O. 21, r. 16 has been rejected may bring a separate suit for a declaration that he is the person entitled to execute the decree. 20 A. 539. No appeal lies against an order allowing one of the two assignees of a decree to execute it to the exclusion of the other. 82 I.C. 734. If the Court refuses to recognise the assignment of a decree, a cause of action against

the judgment-debtor arises which could be enforced in a regular suit. 78 P.R. 1896 ; 75 P.R. 1890 F.B. An objection that the assignee is a benamidar for somebody also cannot be gone into in execution. 22 O.W.N. 491=44 I.C. 13 (*contra* held in 54 I.C. 944). When an application under O. 21, r. 16 by the transferee is dismissed for default of appearance, the order may be appealed against under S. 47. 1 A.L.J. 61 ; 28 A. 613. Disputes as to the legality of the purchase by the judgment-debtors of the rights of some of the decree-holders in the property to which the decree relates and the extent of the share acquired under the purchase are questions falling within S. 47. 10 A. 570 (*contra* in 15 C. 187). No suit will lie to establish a right to execute a decree when an order dismissing an application under O. 21, r. 16, has been allowed to become final. 28 A. 613 ; 25 M. 383 ; 15 M.L.J. 27. An order to the effect "that the objection of the judgment-debtor be disallowed with costs and the name of the purchaser of the decree be substituted in place of the original decree-holder and the case be struck off" is one under S. 47. A.W.N. (1891) 187. The question whether a transferee can execute the decree is one falling under S. 47 and no separate suit lies for a declaration of that right. 26 I. C. 944=2 L.W. 109. The question of the irregularity or illegality of the notice issued under O. 21, r. 16 and its effect is one arising between the parties to the suit and can only be determined under S. 47. A separate suit to declare that certain execution proceedings are void for non-compliance with O. 21, r. 16, is not maintainable. 56 I.C. 461. A decision on a dispute between the decree-holder and the transferee is not appealable under S. 47. 5 C. 592 ; 11 C. 150 ; 12 M. 511. If the name of the transferee is placed on the record, a rejection of his application for execution falls under S. 47. 11 C. 393 ; 12 M. 511 ; 25 M. 383. An application by a transferee decree-holder is an application in execution and not one merely to recognise him as such transferee. A dismissal for default of such a petition after an order passed on it in favour of the transferee decree-holder is an order passed in a matter relating to execution. 33 I.C. 71. When a decree fell to the share of a Hindu lady upon a partition of her deceased husband's estate between herself and her sons and an application for execution of the decree by the executor of the estate was refused on the objection of the sons and the judgment-debtors that the lady had only a life-interest in the decree and it passed on her death to her sons *held* that the appeal lay from the order under S. 47. 11 C.W.N. 239. An order directing the substitution of the assignee as a decree-holder in the place of the original one is not appealable. 13 W.R. 224 ; 15 W.R. 283. When a transferee had agreed to satisfy the decree before it was transferred to him an objection that the decree is satisfied can be taken in execution. 19 M. 290. An order refusing permission to execute a decree is appealable only if the assignee has been legally placed on the record as decree-holder. 11 C. 393 ; 12 M. 511. An order disallowing transferee of the decree to execute it is not appealable. 3 C. 371 ; 26 Bom. L.R. 333=80 I.C. 249 (*contra* in 11 B. 506 ; 25 M. 383).

Absence of succession certificate.—The order of the Court refusing to allow the representatives of the deceased decree-holder to execute the decree and staying such execution until he should have obtained a certificate to collect debts is one passed under S. 47. 5 A. 212.

The order of an executing Court as to the genuineness of the purchaser of a decree arising between the purchaser and the judgment-creditor of the decree-holder who opposes an application by the purchaser for execution falls within S. 47 (3) and is appealable. 32 I.C. 524=20 C.W.N. 679.

ORDER 21, R. 17.—An order under O. 21, r. 17 is not appealable. 9 M.L.T. 347. O'Kinealy, p. 701. An appeal lay under S. 245 of the old Code of 1882 according to S. 588, cl. 11 of the old Code. But under the present Code O. 43 does not provide for such orders.

ORDER 21, R. 18.—The question whether the decree-holders were entitled to have the benefit of a set off of their decrees against the judgment-debtor who had obtained a decree against the former is a question relating to execution. 22 W.R. 235.

ORDER 21, R. 21.—An order allowing simultaneous execution or refusing execution at the same time against the person or property of the judgment-debtor falls under S. 47 and is appealable. 7 B. 301.

ORDER, 21, R. 22.—Questions relating to the absence of issue of notice and its effect fall under S. 47. 40 O. 45. Where every process prescribed by the legislature with a view to appraise the judgment-debtors or their representatives that execution was to proceed against them had been suppressed fraudulently, held that such a case was governed by S. 47 of the C.P. Code. 27 C.L.J. 528=46 I.O. 221. A judgment-debtor has a right to challenge a sale under S. 47 held without notice under r. 22 to him and in such a case there is a right of second appeal. (1923) Pat. 298=83 I.O. 747. An application to set aside a Court sale on the ground that no notice was given of the application for attachment and order for sale, comes under S. 47 and an order passed thereon is appealable as a decree. 47 M. 288. A question whether the omission to serve a notice under O. 21, r. 22 has resulted in substantial injury to the owner of the property sold falls under S. 47. 40 O. 45. An objection to execution under O. 21, r. 22 comes under S. 47, C.P. Code, and the order on such an objection is open to second appeal. 1926 O. 539=91 I.O. 711.

ORDER 21, R. 24.—An order that no warrant of attachment should issue by a certain date is not appealable under S. 47, as not determining any right between the parties. 101 P.L.R. 1911; 9 I.O. 823. The Court is ordinarily bound to issue process for attachment when applied for and cannot properly refuse to do so except as provided in O. 21, r. 24. 57 P.R. 1897.

ORDER 21, R. 26.—Questions relating to stay of execution are not questions relating to execution, discharge or satisfaction of the decree. 27 M.L.J. 171; 55 I.O. 228. Under the corresponding S. 244 of the old Code of 1882 the questions relating to the stay of execution were treated as those falling under S. 47. But under the present Code the words "or to the stay of execution thereof" have been omitted after the words "execution discharge or satisfaction of the decree" and the result is that such questions are no longer within the provisions of S. 47 and no appeal will lie from orders determining such questions. 20 C.L.J. 512; 27 I.O. 444. Rulings under the old Code were, 13 O. 111; 10 A. 389; 20 M. 366; 7 C. 733; 8 C. 477; 12 O. 624; 12 B. 30; 12 B. 279. An order granting stay of execution does not fall under S. 47. 22 Bom. L.R. 1212=59 I.O. 523. An order granting or refusing a stay of execution is not a decree and does not fall within S. 47 of the Code and is not appealable. 45 B. 241; 25 O.W.N. 555; 55 I.O. 229; 46 A. 733. (*contra* in 62 I.O. 342=10 L.B.R. 326; 1926 O. 830; 68 I.O. 751. A decision that an execution shall or shall not take place for the time being is a question relating to execution and is appealable. 68 I.O. 751; 62 I.O. 342=10 L.B.R. 326. No appeal lies from an order of the Court executing a decree granting or refusing an application for extension of time for payment by the judgment-debtor of the amount due under the decree. A.W.N. (1890) 68. An order for security for stay of execution, though one relating to execution is not one which determines the rights of the parties in controversy in the suit and is not appealable under Ss. 47 and 2(2) of the Code. 41 C. 160. The High Court directed that certain execution proceedings pending before a lower Court should be stayed on condition that security should be given to the satisfaction of the Court below. The security was given and the execution stayed; the order of the lower Court accepting the security and staying the proceedings was not an order determining any rights of the parties and therefore was not a decree and was not appealable. 41 C. 160. According to the following rulings it was held that the

omission of the words "stay of execution" in the section is no indication that matters relating to stay of execution are not within S. 47. The omission is due to avoid surplusage. 39 M. 541; 40 M. 233; 14 C.L.J. 489. According to the Punjab view also all orders staying execution of decrees are questions relating to the execution, and are appealable under S. 47. 1923 L. 514=75 I.C. 419 (*contra* in 41 O. 160; 55 I.C. 228).

ORDER 21, R. 32.—A suit is barred under S. 47 for enforcement of a prohibitory injunction embodied in a decree, but the remedy is by way of execution under O. 21, r. 32, C.P. Code. 46 O. 103. When under a compromise decree, the defendant bound himself to endorse certain promissory notes in plaintiff's favour and they became time barred the remedy of the plaintiff is by execution under O. 21, r. 32, and not by a separate suit. 45 I.C. 689=24 M.L.T. 34. When A obtained a decree restraining the defendant from interfering in certain works that he was erecting on the land, an application by the judgment-debtor that A encroached on his land does not lie in execution proceedings. 28 A. 72; 2 A.L.J. 573. When in execution of a decree the plaintiff tried to pull down the building erected by the defendant upon land alleged to be in the decree which was silent as to demolition, the question of the right to remove the building is one under S. 47. 7 W.R. 372. The decree in a suit directing the permanent closing of a door by the judgment-debtor who after formally complying with the order shortly afterwards re-opened it, it was *held* that the decree-holder could proceed by way of execution to have the door closed and no separate suit is necessary. 12 A.L.J. 347=23 I.C. 247.

ORDER 21, R. 34.—An appeal lies from an order under this rule on an objection to the draft of a document or of an endorsement under O. 43, r. 1 (1) as an appeal from an order expressly allowed by law and not under S. 47.

ORDER 21, Rr. 35, 36.—Questions relating to resistance or obstruction to possession of immoveable property by a third party do not fall under S. 47. The decree-holder may either make use of the summary remedy provided by r. 97 or bring a regular suit as provided by r. 103. 8 B. 602; 42 B. 10; 46 I.C. 529; 42 I.C. 928. A suit for possession after failure, omission or negligence to execute the decree giving possession will be barred. 10 B.H.C. 433; 10 C.L.R. 258; 25 W.R. 372; 22 B. 26; 24 C. 473; 17 M. 343 P.C. A person who has been dispossessed under the terms of a decree to which he was a party is not competent to bring a suit for recovery of possession. His remedy is by way of an application to the executing Court. 22 A.L.J. 683=82 I.C. 80. An order rejecting the application by judgment-debtor dispossessed of immoveable property disputing the decree-holder's right to be put into possession falls under S. 47 and is appealable. 25 A. 343. Where a decree ordered delivery of possession of certain land with crops standing upon it, the delivery of the crops can be enforced in execution alone. 6 M.H.C. 13. When the judgment-debtor was ejected notwithstanding the objection that the plaintiff got only a decree for proprietary possession which was overruled, a suit to set aside the order is barred. 9 C. 872. When a party is dispossessed in execution of a decree, the only remedy open to him is to apply in execution proceedings. 5 M.H.C. 185; 6 M.H.C. 293. A usufructuary mortgagee, who was also a co-sharer, brought on a sale by the mortgagor a suit for pre-emption without asking for possession obtained a decree and paid the money into Court, which was received by the vendees. The decree was never executed. *Held* that the plaintiff himself being in possession *qua* mortgagee, it was not necessary for him to seek any further relief in execution of the pre-emption decree under O. 21, r. 36, and that a suit for a declaration of his title is not barred by S. 47, that when the money was deposited under the decree and the same was taken away by the vendees, he became the full owner of the property and no title remained with anybody else. 12 A.L.J. 521=23 I.C. 876.

ORDER 21, R. 40.—An order under O. 21, r. 40 dismissing the application of the decree-holder for the arrest and imprisonment of the judgment-debtor relates to the execution of a decree and is appealable. 1 L. 77 ; 4 L.L.J. 266—1922 L. 259 ; 69 P.R. 1895 ; 21 M. 29 ; 5 I.C. 909 ; 32 I.C. 731. An order granting an application by the judgment-debtor for release under O. 21, r. 40, is an order on a question arising between the parties to the suit and relating to the execution of the decree, so as to fall within S. 47. Such an order is a decree and open to appeal. 21 M. 29. An order for arrest is appealable as a decree. 69 P.R. 1895 ; 22 P.R. 1871. A decision by a Court on the question whether an arrest of the judgment-debtor by a Court officer is legal or otherwise falls under S. 47 and is appealable as a decree. 32 I.C. 731—3 L.W. 35.

ORDER 21, R. 46.—The question whether a debt due to the judgment-debtor attached in execution of the decree against him is really due to the judgment-debtor is triable only in executing Court and no separate suit lies. 3 O.L.J. 756—38 I.C. 461. When debts have been attached under an order of the Court, any person collecting them acts in contempt of Court. An application by the attaching creditor asking the Court to compel such person to disgorge the money and pay it into Court under the penalty of being arrested is an application in execution. 27 A. 378.

ORDER 21, R. 50.—An order directing execution against partners under O. 21, r. 50 (c) is under S. 47 because it is a decree determining the question relating to the rights and liabilities of the parties with reference to the relief granted by the decree. 19 C.W.N. 1008—26 I.C. 866. Where an award is made against a firm, the question as to who are the partners in the firm against whom the award can be enforced falls under S. 47. 86 I.C. 1013—1925 S. 298.

ORDER 21, R. 51.—An order under O. 21, r. 51, is not under S. 47 if the objector is not the judgment-debtor. 19 C. 256.

ORDER 21, R. 52.—All questions involved under O. 21, r. 52, must be as between the decree-holder and the judgment-debtor in the decision which is being executed and are questions under S. 47. 38 I.C. 772—5 L.W. 262. An order passed under O. 21, r. 52 is not an administrative order but a judicial order binding upon the parties concerned. 82 I.C. 240.

ORDER 21, R. 53.—A obtained a decree against B and C. Both B and C along with two other persons held a decree against X and Y; A applied for execution of his decree by attachment of the interest of B and C in the decree which they along with two other persons held against X and Y. The application was refused. *Held* that X and Y being not parties to A's decree, the questions arising between them and A could not be taken as questions relating to the execution of the decree held by A, the order refusing the application does not fall under S. 47 and was not therefore appealable. 17 O.C. 374—27 I.C. 363.

ORDER 21, Rr. 58—63.—These rules refer to objections and claims by third parties and hence they do not fall under S. 47. A special summary remedy is provided for such cases in these rules. A regular suit is also provided in such cases by r. 63. 25 P.L.R. 1915—28 I.C. 14 ; 30 M. 417 ; 63 P.R. 1899 ; A.W.N. (1888) 77 ; 6 W.R. Mis. 46 ; W.R. 1864 Mis. 24 ; 6 Bom. L.R. 462 ; 6 C.W.N. 63 ; 5 W.R. Mis. 28 ; 31 I.C. 393 ; 38 A. 537. O. 21, r. 63, refers to cases in which the claimant or objector was not a party to the suit. If an objection was by a party to the suit, the case would be governed by S. 47, and no separate suit would lie to set aside an order overruling the decision. 16 I.C. 255 ; 16 W.R. 307. An appeal does not lie from the order under O. 21, r. 60 releasing the property from attachment on the ground of possession

by the judgment-debtor, not on his own account, but in trust for some other person. 11 W.R. 204; 21 W.R. 365; 15 O. 437. Where A in execution of a decree for money against B as *shasait* of a deity attaches and proceeds to sell properties of which B or his successor in office alleged that he is in possession not as *shasait* of the deity, but in his own right the case does not fall under S. 47, but under O. 21, r. 63. 42 O. 440. The order of a judge of a High Court on the original side disallowing a claim preferred under these rules by the mortgagees of immoveable property attached in execution of a decree is a judgment within the meaning of cl. 15 of the Letters Patent and is therefore appealable. 25 M. 555. An order declaring that the property sought to be attached does not belong to the judgment-debtor but to an objector falls under the rules and is not appealable. 2 Bom. L.R. 241; 28 B. 458. No appeal lies from an order under O. 21, r. 61. 4 A. 190; 25 M. 555. No appeal lies from an order on an application by an objector or claimant under these rules. 15 W.R. 339; 19 W.R. 98; 38 A. 537; 35 I.C. 6=14 A. L.J. 722; 34 I.C. 759=3 L.W. 377; 32 I.C. 226; 1 R. 276; 38 I.C. 299. An order passed on a claim petition put under these rules is not appealable under S. 47 even if it wrongly purports to be one under S. 47. 38 I.C. 152. An order against the legal representative of the deceased judgment-debtor that the property attached forms part of the assets of the deceased falls under this section. 31 I.C. 321=22 C.L.J. 304. An objection by a defendant against whom a suit is dismissed, although put in under O. 21, r. 58 is still one under S. 47 and an appeal lies from the order thereon. 75 I.C. 747; 87 I.C. 743=3 P.L.R. 482. A suit by a *pro-forma* defendant who was a party to execution proceedings under r. 58 is barred by S. 47. 1926 O. 64=88 I.C. 542.

ORDER 21, R. 64.—An order for sale is appealable as one under S. 47. 4 C.L.R. 27. An order of the Court refusing to allow the sale of the attached debt on the ground that the suit on the basis of the debt was dismissed falls under S. 47 and no separate suit lies for a declaration that the attached debt was really due to the judgment-debtor as this is a question relating to the execution of the decree obtained by the attaching creditor. 3 O.L.J. 756=38 I.C. 461. An order refusing an application that property attached in execution of a decree against the judgment-debtor should be sold in successive shares falls under S. 47. 4 O.L.R. 27. An order allowing an objection to sale is appealable under S. 47; and a separate suit to avoid the consequences of such an order is barred by S. 47. 17 A.L.J. 832=51 I.C. 184. The executing Court has power to effect sale and exclusive power in all matters connected with sales. 3 A. 356; 21 O. 200; 1 I.C. 78.

ORDER 21, R. 66.—An order of the executing Court overruling the judgment-debtor's objection to the valuation put in by the decree-holder in the sale proclamation and refusing the judgment-debtor's prayer for adjournment of the sale and issue of a fresh proclamation do not fall under S. 47. 47 I.C. 512. In 30 C. 617 it was held that an order disallowing the judgment-debtor's objection to the property being inadequately valued in the proclamation is appealable. See also 36 P.W.R. 1919=49 I.C. 534; 6 I.C. 180. An order directing the properties advertised for sale in a sale proclamation to be sold in a particular order is administrative in its character and is not appealable. 46 M.L.J. 192=78 I.C. 829. An order fixing the upset price in a sale proclamation is not appealable. 44 M.L.J. 599=72 I.C. 836; 27 M. 259 F.B.; (1917) M.W.N. 141. An order settling terms of a proclamation and directing its issue is not appealable. 64 I.C. 547=35 C.L.J. 170. Every order passed in execution proceedings is not appealable; only such orders as conclusively determine the rights of the parties are appealable. No appeal lies against an order accepting the valuation put up on a property by the decree-holder under O. 21, r. 66. 14 C.L.J. 35; 16 C.W.N. 970=17 I.C. 88; 22 I.C. 548; 10 I.C. 371=16 C.W.N. 124; 14 A.L.J. 363=35 I.C. 230; 2 P. L.J. 13=38 I.C. 616; 27 M. 259 F.B.; 46 M.L.J. 71. An order tentatively fixing for the purposes of an auction sale, the market

value of the property deciding the figure at which the bidding should commence cannot be regarded as a conclusive determination of any right of parties under S. 47. (1917) M.W.N. 141=39 I.C. 897; 22 I.C. 648; 11 I.C. 759=14 C.L.J. 607; 72 I.O. 836; 16 C.W.N. 124; 27 M. 259; 39 A. 415; 16 C.W.N. 970; 36 I.C. 402; 46 I.O. 564; 38 I.C. 616; 47 I.C. 512; 78 I.O. 829; 6 Pat. L.J. 507. The question whether the Court could sell the property subject to encumbrances is one relating to execution, etc. 72 I. O. 860=(1923) Pat. 76. A complaint relating to the violation of O. 21, r. 66 on the ground that notice was not given to all the parties concerned before the proclamation was settled, falls under O. 21, r. 66 and S. 47 and there is an appeal and a second appeal consequently. (1919) M.W.N. 897=53 I.C. 809; 10 Bom. L.R. 752. The action of the Court in settling the terms of a proclamation under O. 21, r. 66 is a judicial act and is appealable. 36 P.W.R. 1919; 49 I.C. 539; 27 I.C. 872; 35 I.O. 230=14 A.L.J. 363. No appeal lies from an order under O. 21, r. 66 (4) as it does not fall under S. 47. 8 L.B.R. 350=36 I.C. 402; 16 C.W.N. 970; 46 I.O. 564 (*contra* held in 36 P.W.R. 1919=46 I.C. 539; 35 I.C. 230; 6 I.O. 180=15 C.W.N. 713; 30 C. 617). When the values stated by the judgment-debtor and the decree-holder were stated in the proclamation of sale and no enquiry was made as to whether any of these values was correct or whether any other value was correct, the order does not fall under S. 47 and no second appeal lies to the High Court. 11 I.C. 759. None of the proceedings of a Court under O. 21, r. 66 in relation to the proclamation of sale is an order within S. 47 and as such no appeal lies. Proceedings under this rule are of an administrative character, and not of a judicial character. 27 M. 259 F.B.; 6 M.L.T. 252; 4 M.L.T. 352=18 M.L.J. 568. A complaint relating to the violation of O. 21, r. 66 on the ground that notice was not given to all the parties concerned before the proclamation of sale was settled is not covered by O. 21, r. 90 and can only be considered under S. 47 and there is an appeal and a second appeal against the decision relating thereto. 53 I.C. 809=(1919) M.W.N. 897. An order summarily dismissing the objections of the judgment-debtor to the proclamation of sale falls under S. 47. 14 A.L.J. 363. When the question relates to substantive rights, though it relates only to the order in which the properties are to be sold it falls under S. 47. 18 L.W. 311=(1923) M.W.N. 662; 72 I.O. 860=1923 P. 14. See 78 I.O. 829; 8 O.O. 861.

ORDER 21, R. 71.—If the decree-holder is the defaulting purchaser the question falls under S. 47; 12 M. 454. An order under this rule allowing or disallowing an application for recovery of the loss by resale is appealable as a decree under S. 47. 12 M. 454; 2 C.W.N. 411; 18 M. 439; 1 A. 181 F.B.; 88 I.O. 131=23 O.C. 327; 30 B. 329; 25 O. 99; 16 C. 535; 44 A. 266 (overruling 14 A. 201; 13 A. 22; 12 A. 397). An appeal lies even if the purchaser is not a party to the suit. 16 C. 535. A separate suit to question the order of a Court to pay up deficiency is not disallowed by any enactments or rulings. 19 A. 22; 14 A. 201; 12 A. 397; 7 N.L.R. 134. An appeal is not allowed from such an order (*ibid*) (*contra* held in 87 I.O. 234=1925 O. 360). When the decree is for a money claim less than Rs. 500 a second appeal does not lie from such an order under this rule. 45 B. 223.

ORDER 21, R. 72.—Where a decree-holder without leave of the court buys the property of the judgment-debtor at a Court sale, the remedy of the latter is by an application under r. 72 and S. 47 and not by a separate suit, because the question whether a sale should be set aside or not is a question between the parties to the suit and relating to the execution of the decree. 22 B. 271; 23 A. 478; 16 M. 287; 22 A. 108; 16 M. 447; 11 B. 588; 26 C. 324; 17 I.O. 126. An order setting aside or refusing to set aside a sale is appealable under O. 43, r. 1 (i). 24 A. 103; 13 C. 174; 10 C. 368. And no second appeal lies. 21 C. 789; 28 I.O. 270=13 A.L.J. 351. An appeal does not lie from an order refusing to give a decree-holder permission to purchase at the court sale for such a question does not relate to execution of the decree. 88 C. 717 P.C.; 19 C.W.N. 633; 13 C. 174.

ORDER 21, R. 78.—Though O. 21, r. 78 allows judgment-debtor to sue for compensation in publishing or conducting a sale of moveable property, that rule should be read with S. 47 which prohibits a suit from being brought to decide any question between the parties which ought to have been decided by the Court executing the decree. 14 P.R. 1886 ; 8 P.R. 1902.

ORDER 21, R. 83.—An order postponing or refusing to postpone a sale under O. 21, r. 83 relates to execution. 3 O.C. 42. No appeal lies from an order refusing to extend time for redemption to enable the judgment-debtor to raise the amount by mortgage or private sale. 46 M.L.J. 71=(1923) M.W.N. 894.

ORDER 21, R. 84.—An order setting aside a sale in execution of a decree because of the default of the auction-purchaser in depositing the purchase money is not appealable. 58 I.C. 597=2 U.P.L.R. 81. An appeal lies from an order dismissing the application of the decree-holder for the realisation of the difference of price from the first purchaser. 18 M. 439 ; 1 A. 181 ; 16 C. 535 ; 14 A. 201 ; 13 A. 569.

ORDER 21, R. 85.—Questions between the auction-purchaser and the decree-holder as to time for payment of the money under O. 21, r. 85 is one under S. 47 because after the confirmation of sale the auction-purchaser must be deemed to be the representative of the judgment-debtor and an order passed against him is appealable. (1917) M.W.N. 861=42 I.C. 552.

ORDER 21, R. 86.—An order cancelling the sale and directing a resale on the ground of the purchaser's default in paying the full amount within the prescribed time falls under S. 47 if the question relates between the parties to the suit. 16 M. 20. An order setting aside a sale in execution of a decree because of the default of the auction-purchaser in depositing the purchase money is not appealable. 58 I.C. 597=2 U.P.L.R. 81.

ORDER 21, R. 88.—There is no appeal against an order under this rule confirming a sale in execution of a decree in favour of the decree-holder who being also a co-sharer had successfully urged his right of pre-emption and also obtained permission to bid for such share. 3 A. 674. (See also decree-holder auction purchaser, *supra*). A co-sharer not a party to the suit has no right of appeal from an order confirming the sale in favour of another person. 3 A. 674 ; 5 A. 42. An order refusing to restore an application under this rule dismissed for default of appearance is not appealable. 29 A. 596.

ORDER 21, Rr. 89, 90, 91, 92.—In determining whether an application to set aside a sale falls within the scope of S. 47 or not, the point to be considered is whether there is a contest regarding the validity of the sale between the parties to the suit. 6 C.W.N. 279 ; 13 C.L.J. 467. When such a contest is between the parties to the suit S. 47, applies. 27 C. 810 ; 33 C. 283 ; 24 A. 108 ; 30 M. 507 ; 36 B. 156. An order confirming such a sale falls under S. 47. 28 C. 116. An application by the judgment-debtor to set aside a sale on the ground that the sale proceedings have been secretly brought about without his knowledge and that the certified purchasers under the sale were benamidars for the decree-holders who had not obtained the necessary permission to purchase falls under S. 47 and no separate suit lies. 23 A. 428. An order under O. 21, r. 89, passed on an application by a decree-holder who is also the purchaser is one under S. 47 and an appeal lies therefrom. 28 C. 73 ; 1 C.W.N. 703 ; 5 O.C. 377 ; 25 M. 244 F.B. ; 29 A. 275 ; 30 M. 507. The question whether the purchases of an occupancy holder is entitled to come in under O. 21, r. 89, to make a deposit and to have a sale held for its own arrears set aside is one that comes under S. 47. 7 C.L.J. 282. An order under O. 21, r. 89, does not fall under S. 47 and no second appeal lies. 36 I.C. 769. The true nature of the order under O. 21, r. 89, must be examined and the character of the parties affected thereby ascertained before it can be determined

whether the order does or does not fall within the scope of S. 47. When an order passed under r. 92 in proceedings between the decree-holder and the judgment-debtor a second appeal lies under S. 47. 13 C.L.J. 467 = 10 I.C. 51. A suit lies by a person whose objection under r. 89 has been disallowed, when he was neither a party to the suit in which the decree was passed nor to the execution proceedings which followed the decree. 104 P.L.R. 1916 ; 10 A. 1. If the attachment and sale were effected without the knowledge of the party objecting, the proper course for him to set aside the order is in execution proceedings. 17 I.C. 126. An application to set aside an execution sale on the ground of fraud, the fraud being that the decree had been satisfied by payment to the agent of the decree-holder on the day before the sale but the payment was not certified and the sale was held, falls under S. 47 and not under O. 21, r. 90. 10 I.C. 625. An order setting aside or refusing to set aside a sale for irregularities does not fall under S. 47 and no second appeal lies. 38 P.L.R. 1915 ; 11 Bur. L.T. 26 = 39 I. C. 374 ; 19 C.L.J. 87 = 20 I.C. 191. An application to set aside a sale for absence of attachment or for defective attachment falls under S. 47 and not O. 21, r. 90. 1 R. 593. Where questions are raised between the parties to the suit relating to execution, discharge or satisfaction of the decree the fact that the purchaser at an execution sale who is no party to the suit is interested and concerned in the result has never been a bar to the application of the section limiting the disposal of these matters to the Court executing the decree. 19 C. 683 P.O. ; 1 C.W.N. 656 ; 24 A. 209 ; 23 M. 55 ; 25 B. 418 ; 6 C.W.N. 283 ; 26 A. 447 ; 9 C.W.N. 134 ; 11 Bom. L.R. 699 ; 12 C.W.N. 485 ; 1 A.L.J. 65 ; 3 C.W.N. 6 ; 7 C.W.N. 591. Where an order under O. 21, r. 89 does not decide a question between the parties to the decree or their representatives although it is an order relating to the execution of the decree it does not come within the provisions of S. 47. 1 C.W.N. 114 ; 6 C.W.N. 57. When during the pendency of an application by the judgment-debtor to set aside a sale under O. 21, r. 90, the decree-holder purchaser agreed to give back the property on receipt of the decretal amount within a fixed time and on non-payment of the money within the limitation, the District Munsiff extended the time for the payment against the wishes of the decree-holder, the order of the Judge was under O. 21, r. 89 or 90 and therefore appealable as such and not under S. 47. 36 I.C. 809. Where the auction-purchaser is the decree-holder himself and an application is made to have the sale set aside on a ground other than that covered by O. 21, r. 90, there being no objection under r. 89, the question falls under S. 47. 83 I.C. 1028 = 22 A.L.J. 413. When property outside the suit has been included by mistake in the decree and is sold in execution and two years after the confirmation of sale the plaintiff sued for the recovery of property or its value, held the suit could not lie until the Court sale was set aside, it not being a nullity ; and the plaintiff not having set aside a sale within the period prescribed by Art. 166, the suit is barred. 24 Bom. L.R. 423 = 67 I.C. 257. An application based on fraud in publishing or conducting a sale comes within the purview of O. 21, r. 90 and not under S. 47. The new code has altered the law in this respect. 40 A. 122 ; 3 Pat. L.J. 645 = 48 I.C. 560 ; 33 I.C. 692 = (1916) 1 M. W.N. 256 ; An application to set aside a sale on the ground that the fraud has been committed in not certifying the payment which was made to the husband of the decree-holder falls within S. 47 and not under O. 21, r. 90 and hence a second appeal lies. 10 I.C. 625. When a judgment-debtor's application under O. 21, r. 90 on the ground of fraud is rejected he cannot litigate the same point again. The decision of the executing Court is a bar to a fresh impeachment of the sale, not under S. 47 but under O. 21, r. 92. 38 I.C. 47. An executing Court can set aside a sale on any ground not falling within O. 21, r. 90 on an application under S. 47 and no separate suit will lie for the purpose. 34 I.C. 829. It is only when O. 21, r. 90, and S. 47 apply to the application to set aside an execution sale that a second appeal is incompetent. But when S. 47 applies, there is a second appeal from the order on the application. 30 M.L.J. 611 = 34 I.C. 829 ; 22 C.L.J. 266 = 16 I.C. 690. A complaint relating

to the violation of O. 21, r. 66 on the ground that a notice was not given to all the parties concerned before the proclamation was settled is not covered by O. 21, r. 90, and can only be considered under S. 47. 58 I.C. 809—(1919) N.W.N. 897.

ORDER 21, R. 90.—It is of a limited scope and application and an application which raises questions as to the execution of a decree, being clearly beyond its scope ought to be dealt with under S. 47. 52 I.C. 514. S. 47 does not require that a person making an application under r. 90 should be a party to the execution proceedings but requires that he must be a party to the suit in which the decree was passed. 52 I.C. 514. Proceedings to set aside the sale on the ground of material irregularity or fraud in publishing or conducting the sale involve questions relating to the execution, discharge or satisfaction of the decree and hence fall under both S. 47 and O. 21, r. 90. O. 21, r. 90, must be read with S. 47, C.P. Code. 33 I.C. 692—(1916) 1 M.W.N. 256. An order falling under these rules, in order to be appealable under S. 47 must be an order relating to the execution, discharge or satisfaction of the decree and determining a question arising between the parties to the suit or their representatives. 9 I.C. 472—4 Bur.L. T. 28. An order, on an application to set aside the sale passed between the decree-holder-auction-purchaser and the judgment-debtor is appealable under S. 47. 1 O.W.N. 703. An application under O. 21, r. 89 to set aside a sale by the judgment-debtor against a stranger auction-purchaser does not fall under S. 47 as the auction-purchaser is the representative of the judgment-debtor and not the decree-holder. 30 A. 379; 19 A. 140; 27 A. 263; 26 A. 447; 25 B. 631; 7 A. 681 (*contra* in 29 A. 275, dissented from). Where private transferees before the execution of a decree (mortgage-decree) applied to set aside the sale alleging that the execution proceedings had been brought about by collusion between the decree-holder and judgment-debtors who had parted with their rights, that the decree had been satisfied before the sale and that execution application of the decree-holder was barred by limitation *held* that the application came under S. 47. 21 I.C. 998—18 C.L.J. 264. An appeal is expressly provided by O. 43, r. 1 (j) against orders under this rule. 4 Pat. L.T. 725; 77 I.C. 522—1922 O. 180.

ORDER 21, R. 91.—A suit for the refund of purchase-money is not maintainable by the auction-purchaser on the ground that the judgment-debtor had no saleable interest in the land. 80 I.C. 257—40 C.L.J. 157. A suit lies for a refund of the purchase-money when the judgment-debtor is found to have no saleable interest in the property sold. 5 O.W.N. 240; 157 P.R. 1884; 183 P.R. 1883. For other rulings see "Setting aside Sales" under O. 21, r. 91.

ORDER 21, R. 92.—An order passed under r. 92 in proceedings between the decree-holder and the judgment-debtor falls under S. 47 and an appeal and a second appeal lie therefrom. 10 I.C. 51—13 C.L.J. 467. An order refusing to confirm a sale for want of a subsisting decree is appealable under S. 47 if the question is one between the parties to the suit. 1 O.W.N. 656; 25 C. 175; 26 C. 727; 6 O.W.N. 283. In determining whether an application to set aside a sale comes within the scope of S. 47 or not, the point to be considered is whether there is a contest regarding the validity of the sale between the parties to the suit. 6 O.W.N. 279; 7 I.C. 457; 12 Bom. L.R. 689; 33 B. 698; 31 B. 207; 28 C. 116; 30 M. 507; 30 M. 313; 8 O.C. 254; (1916) 1 M.W.N. 256; 33 C. 283; 24 A. 108; 22 M. 347. Neither S. 47 nor O. 21, r. 92 (3) bars a suit by a person whose objection under O. 21, r. 89 has been disallowed when he was neither a party to the suit in which the decree was passed nor to the execution proceedings which followed the decree. 104 P.L.R. 1916—36 I.C. 212. The plaintiff had deposited Rs. 4,500 to release from a Court-sale held under a previous mortgage the property included in his hypothecation bond. His application to reserve his rights thereunder had been rejected. He instituted a suit later on for the recovery of the

same, *held* that the suit was not barred under S. 47. 1922 L. 358. An application to set aside a sale for want of attachment does not fall under O. 21, r. 90 but under S. 47, C.P. Code. 1 R. 533. An order confirming or setting aside a sale under O. 21, r. 92 is appealable under O. 43, r. 1 (j). 4 L. 243; 40 A. 425. And no second appeal lies. 39 C. 687; 4 L. 243; 6 I. C. 573; 15 O. W. N. 685=13 O. L. J. 535; 28 C. 4; 168 P.R. 1919; 66 I.C. 929=25 O.O. 78; 1 Lah. Cas. 6. An appeal lies to the Privy Council from an order under this rule, setting aside or confirming a sale. 40 C. 635.

ORDER 21, R. 93.—An order under O. 21, r. 93 in favour of a third party purchaser is not a question between the parties and hence does not fall under S. 47. (1916) 1 M.W. N. 109. Under the corresponding S. 315 of the old Code when on the setting aside of an execution sale the purchaser applied for a refund of the price and an order refusing the refund was made under the above section, it was *held* that no appeal lay from the order of refusal. 12 A. 397; 14 A. 201; (11 C. 535, dissented from). No appeal lies from an order refusing or allowing refund of purchase-money. A.W.N. (1884) 178. An application for refund of the purchase-money can be made by the purchaser under S. 47. 45 A. 369. A claim for refund of the proceeds of an execution sale on the ground that the decree has been satisfied by compromise must be tried under this section. 23 W.R. 207. An application to recover from the decree-holder the proceeds of an execution sale which is set aside falls under S. 47. 24 A. 291. An auction-purchaser's right to a refund of purchase-money, the sale having been set aside for irregularity is not a question within the meaning of S. 47. 32 C. 332. An order for refund under O. 21, r. 93 is not appealable as a decree under S. 47. 38 I.C. 235=(1916) 1 M.W.N. 109.

ORDER 21, R. 94.—An order amending or refusing to amend a sale certificate is not appealable. 23 A. 476; 20 C. 529; 20 M. 487. An order refusing to grant a sale certificate to the decree-holder purchaser does not fall under S. 47. 7 C.L.J. 436. No appeal lies against an order granting a review and directing the amendment of a sale certificate. 26 C. 529; 1 O.W.N. 658; 23 A. 476; 7 C.L.J. 436.

ORDER 21, R. 95.—S. 47, C.P. Code, has no application to a suit brought by the decree-holder who has with the permission of the Court purchased the property of the judgment-debtor sold in execution of the decree, for recovery of possession of that property on the strength of sale to him; nor is such a suit barred because the plaintiff has failed to avail himself of the summary remedy provided by O. 21, r. 95; or having sought that remedy has failed; such summary remedy being concurrent with his remedy by a separate suit. 8 P.R. 1918; 31 A. 82. Proceedings for delivery of possession to the auction-purchaser are proceedings in execution and do not fall within S. 47. Where a stranger is the auction-purchaser he may bring a suit for possession which will be governed by Art. 138 of the Limitation Act. 35 B. 452; 47 I.C. 844; 44 B. 977. Where under an execution sale lands not included in the sale certificate were by mistake delivered to the purchaser, the judgment-debtor cannot claim the re-delivery by a separate suit. 45 I.C. 603. Where a decree-holder auction-purchaser applied for delivery of possession of the properties purchased and obtained delivery of possession by order of Court, notwithstanding the objection by the judgment-debtor that the properties did not pass by the sale *held* that an appeal does not lie. 1 Pat. L.J. 232 F.B.=35 I.C. 468 F.B.; 19 C.W.N. 835=25 I.C. 267; 27 C. 34; 27 C. 709=38 P.L.R. 1915=27 I.C. 589; 29 C.L.J. 48=20 C.W.N. 829; 48 I.C. 129 (*contra* in 28 M. 87; 25 A 343; 26 M. 740; 24 M. 185; 25 M. 529; 53 P.R. 1888; 3 A.L.J. 234; 5 A.L.J. 20; 35 B. 452; 31 A 82 F.B.; 31 C. 737; 18 O.W.N. 27.) A decree-holder auction-purchaser can maintain a suit for possession irrespective of the remedy provided by O. 21, r. 95, C.P. Code and S. 47 does not bar such a suit. Questions relating to the possession of the

property after a sale has taken place cannot be deemed to be questions connected with the execution, discharge or satisfaction of the decree. 18 O.C. 335 = 33 I.C. 367 ; 50 I.C. 299 ; 3 Pat L.J. 571 = 48 I. C. 129. When the application is not between the parties to the suit S. 47 does not apply. 53 I.C. 923. When a decree-holder by his own action combines the position of a decree-holder and an auction-purchaser by purchasing at the auction sale with the permission of the Court, he does not lose his character of a party to the suit and proceedings in execution are not terminated until he obtains possession of the property inasmuch as O. 21, r. 95 provides for delivery of possession being enforced in execution of the decree. S. 47 of the O.P. Code is a bar to a suit for possession by the decree-holder auction-purchaser. 44 I.C. 563. When the parties agreed that the judgment-debtor should not apply to set aside the sale and that the delivery of possession be delayed to give time to the judgment-debtor to pay off the debt, but the decree-holder applied to get delivery of possession, an objection by the judgment-debtor lies in execution proceedings and not by a separate suit. 20 I.C. 874 = 18 C.W.N. 27. An order directing delivery of possession to the decree-holder auction-purchaser overruling the plea of the judgment-debtor that the application presented more than three years after the confirmation of sale was barred by limitation under Art. 180, falls under S. 47 and is appealable. 22 I.C. 497.

ORDER 21, R. 95.—Delivery of symbolical possession is operative against the judgment-debtor who from such date becomes a trespasser and the remedy of the decree-holder who has failed to get actual possession is by suit, 20 C.W.N. 675 = 35 I.C. 294 ; 19 C.W.N. 835 ; (35 B. 452 and 26 M. 740, dissented from). An order under this rule is not liable to appeal. 18 A. 36 ; 31 A. 82. Any question arising as to the kind of possession to which the auction-purchaser is entitled relates to execution. 27 O. 34 ; 9 C. 872. When a person takes symbolical possession he can bring a regular suit to enforce actual possession. 11 C. 93 ; *contra* in 25 W.R. 372 ; 28 A. 722 ; 24 C. 715 ; 18 C.W.N. 49 ; 29 M. 294 ; 15 M. 226 ; 1 C.W.N. 170. When an order is passed, against a person who obstructed the decree-holder to get possession, a suit is not barred. 2 C.W.N. 311.

ORDER 21, Rr. 97-103.—An objection by the legal representative of a deceased judgment-debtor to the delivery of possession to the auction-purchaser does not relate to execution, discharge or satisfaction of the decree, inasmuch as the satisfaction of the decree had taken place. 121 P.R. 1919 ; 8 P.R. 1918 ; 31 A. 82 F.B. An application by an auction-purchaser alleging obstruction in obtaining possession of the property purchased by a person claiming to be a prior auction-purchaser and praying that he might be put in possession is an application under r. 97 and not one under S. 47. 52 I.C. 388. Where a decree-holder under a *bona fide* mistake brought to sale in execution some of his own properties and they were purchased by a stranger and the sale was confirmed, the decree-holder's only remedy was by a separate suit under O. 21, r. 103 ; and not by an application under S. 47. (1922) M.W.N. 121 = 15 L.W. 272. The proper remedy of a decree-holder auction-purchaser who is resisted in trying to get possession of the property purchased by the judgment-debtor as well as a third person claiming to have an interest in the property is to bring a separate suit for possession both against the judgment-debtor and the stranger. S. 47 is no bar to such a suit. 44 B. 977.

ORDER 21, R. 103.—It only applies to cases where strangers to the decree are involved, while S. 47 governs cases when the persons concerned are parties to the suit or their representatives. 41 M.L.J. 54 = 63 I.C. 730. When the decree-holder auction-purchaser in execution of a decree is obstructed in obtaining possession and the Court refuses to remove the obstructions, the order is one under S. 47. 39 M.L.J. 603 = 61 I. C. 349 ; (1921) M.W.N. 562 (*contra* held by the Calcutta High Court, 29 C.L.J. 48 = 49 I.C. 137). Where a transferee *pendente lite* from a defendant obstructs delivery

of possession in execution to the decree-holder and the Court orders the obstruction to be removed, the order is one under S. 47 and is appealable. (1921) M.W.N. 698. When the judgment-debtor objected that the auction-purchaser had taken possession of property to which his sale certificate gave him no title *held* the question in dispute should be decided by the separate suit and not under S. 47. 14 O.C. 70=10 I.C. 714 (31 A. 82, followed).

Order 21, R. 103, which gives a right of suit to a party who is not a judgment-debtor, is not restricted by the provisions of S. 47. 52 I.C. 928. When the judgment-debtor obstructed the decree-holder purchaser in obtaining possession, an order rejecting the latter's application for possession falls under S. 47 and is appealable. 13 M. 504. No appeal lies against an order under O. 21, r. 101. 57 P.R. 1917; 17 A. 222. Where prior mortgagee of a property sold in execution of a decree based on a subsequent mortgage applied to restore possession to him, the possession having been delivered to the mortgagee auction-purchaser and the application dismissed, *held* that the order did not fall within S. 47. 24 I.C. 93. An order giving or refusing delivery of possession after an execution sale is not appealable under S. 47 even when the decree-holder is the auction-purchaser. 49 I.C. 139=29 O.L.J. 48 (1921); M.W.N. 689. 57 P. R. 1917 (*contra* in 3 M. 81; 13 M. 504; 16 M. 127; (1921) M.W.N. 487).

ORDER 20, R. 11.—An agreement between the decree-holder and the judgment-debtor to give time in variation of the decree and sanctioned by the Court is enforceable in execution. (1912) M.W.N. 458.

ORDER 20, R. 14.—The question whether a pre-emptor has paid the amount fixed by a pre-emption decree within time or not is a matter affecting the operation of the decree and strictly does not relate to its execution under S. 47. 17 O.C. 14=21 I.C. 198; 2 O.L.J. 151=28 I.C. 379. The question whether payment was made in time of the money required to be deposited under a pre-emption decree is one affecting the discharge or satisfaction of the decree and as such falls under S. 47. 74 I.C. 558=26 O.C. 345. Where a pre-emption-decree was silent as to crops, the question whether standing crops passed with the land cannot be said to have arisen in execution. 1923 N. 327. Where the plaintiff in a pre-emption suit obtains a decree awarding possession to him on payment of purchase-money and pays the money, but does not obtain possession, he cannot maintain a fresh suit for possession. It is barred by S. 47. 43 A. 170. A question as to whether purchase money has been paid within time in a pre-emption case, is not one relating to execution. 4 A. 420; 9 A. 500 (*contra* in 38 P.R. 1898; 32 P.R. 1879).

ORDER. 20, R. 15.—A question relating to profits after a preliminary decree for accounts but before a final decree is not one relating to execution, etc. 71 I.C. 817.

ORDER 20—S. 47 does not apply to questions arising in the proceedings for the making of the preliminary mortgage decree final as a suit on a mortgage remains pending till the final decree. 82 I.C. 452.

ORDER 26, R. 13.—An order on an application for the appointment of a Commissioner to work out the shares receivable under a compromise decree for partition is not within S. 47, because such an application is a step in the suit and not in the execution Proceedings. 18 M.L.T. 145=30 I.C. 380; 17 M.L.J. 144; 52 I.C. 614. An order passed in a suit for partition, subsequent to the preliminary decree appointing a Commissioner to make the partition is not appealable as an order in execution. 24 O. 725.

ORDER 32, R. 7.—A compromise entered into by the parties to the suit in the execution proceedings without the sanction of the Court can be questioned in the

execution proceedings and not by a separate suit. S. 47 bars a fresh suit. (1920) Pat. 358—5 Pat. L.J. 379.

ORDER 34, R. 3.—An order excluding from the auction sale the properties included in a previous mortgage on the ground that the subsequent mortgagees had foreclosed their mortgage of the property, is one not merely under O. 34, r. 3 but also comes under S. 47 and is hence appealable on the ground that the subsequent mortgagees are the representatives of the judgment-debtor. 41 C. 418.

ORDER 34, R. 5 (2).—An order dismissing an application by the mortgagee for a final decree for sale under O. 34, r. 5 (2) is not an order in execution of the preliminary decree but is an order in the suit itself. 43 M. 52. An order dismissing an application for a final decree for sale in a mortgage suit is not an order in execution, and hence not one under S. 47. 35 M.L.J. 552.

ORDER 34, R. 7.—A mortgagor who has brought a suit for redemption and obtained a decree nisi which neither the mortgagor nor the mortgagee has applied to be made absolute, can, after the execution of that decree is time barred, bring a fresh suit for redemption. 43 B. 334 ; 39 B. 41.

ORDER 34, R. 8.—No appeal lies against an order extending the time fixed for payment of the mortgage amount in a redemption suit. 39 M. 876.

ORDER 34, R. 14.—A mortgaged his house with possession to B in 1910 but continued in possession under a rent note passed at the same time to B. The rent having fallen into arrears, B obtained a decree against A for possession of the house and arrears of rent. In execution of the decree, A's equity of redemption was sold at a Court-sale to C in January 1916. The sale was confirmed in March of the same year ; held that the proper remedy of A to set aside the sale was an application under S. 47 and not a separate suit. 22 Bom. L.R. 670—58 I.C. 231. The proper remedy of the mortgagor with possession, against whom a decree for possession and rent was passed and in execution of the same the equity of redemption of the mortgagor was sold, to set aside the sale, is by an application under S. 47 and not by a separate suit. 45 B. 174.

ORDER 40, R. 1.—An order refusing to discharge a receiver falls under the section. 3 Pat.L.J. 413—46 I.C. 655. All questions regarding the appointment or removal of a receiver appointed by a decree in an administration suit fall within this section. 5 B. 45. Questions regarding the appointment of person as the head of a mutt in execution of a decree are under S. 47. 13 M. 338.

ORDER 41, R. 5.—There is no appeal from an order granting a refusing to stay execution by an appellate Court. 68 I.C. 49 ; 29 B. 71 ; 146 P.R. 1907 ; 45 B. 241 ; 25 I.C. 47—27 M.L.J. 171 ; but see 12 B. 279. An order of an appellate Court refusing to stay execution of the decree under appeal is not a decree within the meaning of S. 2 (2), C.P. Code ; no appeal therefore lies from such an order. 29 B. 71. An order for security for stay of execution though one relating to stay of execution of a decree is not one which determines the rights of the parties in controversy in the suit and does not come within S. 47. 41 C. 160 ; 45 B. 241 ; 59 I.C. 523—22 Bom. L.R. 1212 ; 68 I.C. 49 ; 46 A. 733 ; 1923 L. 446 (contra in 76 I.C. 174). (Contra was held under the old Code 12 C. 624 ; 7 A. 73 ; 7 C. 733 ; 12 B. 279 ; 12 B. 30 ; 8 C. 477). Where immoveable property has been given by the judgment-debtor as security for the due performance of the decree pursuant to an order of the Court under O. 41, r. 5 (3), the property can be realised by the decree-holder in execution and no separate suit is necessary or maintainable for such realisation. 30 C. 1060 ; 41 M. 327. An order by which security offered by the decree-holder for getting delivery of possession of the

property forming the subject matter of the decree is accepted and the delivery of possession is directed to be made to the decree-holder is appealable inasmuch as the order directing the delivery of possession is a final order and not an interlocutory one. 22 O.W.N. 657=44 I.C. 156.

AGREEMENT NOT TO EXECUTE THE DECREE.—An agreement not to execute the decree made prior to the passing of the decree is triable under S. 47. 13 M. 504 ; 9 B. 468 ; 8 M.L.J. 193 ; 21 B. 463 F.B. ; 39 M. 541 (*contra* in 31 O. 179 ; 29 O. 810 ; 6 O.W.N. 796 ; 17 B. 23 ; a regular suit lies). The question whether there was an agreement between the parties to a suit that no decree should be obtained therein cannot be gone into in execution. (1918) M.W.N. 547=46 I.C. 880. An agreement to treat the decree that might be passed in the suit as partly inexecutable cannot be recognised by the executing Court as a bar to the execution of the decree. 48 M. 725. But a suit for damages for breach of the contract not to execute the decree is not barred. 22 B. 394 ; 13 I.C. 944=15 O.L.J. 88. An agreement to stay execution is triable in execution. 8 I.C. 1071=9 M.L.T. 464. Where the parties to a suit entered into an agreement by which one of the parties agreed to submit to a decree to be passed in the suit in a particular manner within a certain date and that the other party should not before that date execute or assign the decree ; and a decree was consequently passed in the suit and the decree-holder sought to execute the decree before the time fixed in the agreement and the judgment-debtor pleaded the agreement in the execution proceedings, it was held that such an agreement can be given effect to in execution proceedings under S. 47 of the Code so as to operate a stay of execution of the decree. 40 M. 233 F.B. An agreement that the decree-holder would not take possession for two years after confirmation of sale falls under this section. 18 O.W.N. 27.

AMENDMENT OF DECREE.—An order amending a decree is not one covered by S. 47. 46 I.C. 9 ; 43 P.R. 1918.

AMENDMENT OF CERTIFICATE OF SALE.—If one property is sold and two are included in the sale certificate, the Court can amend it under S. 47 or under its inherent powers under S. 151. 10 O.W.N. 1027. An order amending a sale certificate on review is not appealable. 26 O. 529. Also an order refusing to amend is not appealable. 23 A. 476.

ANCESTRAL PROPERTY.—When a sale is effected by the Collector, a suit to set aside the sale on the ground that the property is not ancestral does not lie. 22 A. 108 ; 28 A. 273 ; 87 P.R. 1887 ; 26 A. 101 ; 5 Bom. L.R. 648.

AWARD.—For the purposes of S. 47, an award must be considered to be a decree in a suit, and the award proceedings must be deemed to be a suit. An appeal lies against an order in execution although the execution was of an award and not of a decree in a suit. 16 S.L.R. 245=79 I.C. 477.

BENAMI TRANSACTIONS.—A suit for a declaration that a decree purchased in the name of a defendant who had wrongly taken out execution of the same in his own name had been really purchased by the plaintiff for his own benefit and that the defendant was only his benamidar, is maintainable notwithstanding the provisions of S. 47, O.P. Code. 25 O. 49 ; 3 M.L.J. 220.

BID.—An order refusing the decree-holder to withdraw the bid he had himself made and upon which the hammer had fallen does not adjudicate any right. It is not a decree and no second appeal lies. 19 O.W.N. 633=27 I.C. 805.

COMPROMISE.—Questions whether a person was entitled to more land than given by a compromise decree falls under S. 47. 9 A. 229. When a suit for

possession is compromised on an agreement, a subsequent suit lies for executing a kabuliati in accordance with the agreement. 7 C.W.N. 158 ; 22 C. 903. When a suit is compromised and the agreement does not form part of the decree a separate suit lies. 14 W.R. 85. When a decree is merged in a subsequent agreement there is satisfaction of the decree and the agreement can be enforced by a separate suit. 51 P.R. 1885 ; 19 B. 546 (*contra* in 16 P.R. 1876). When by a compromise in a decree the amount was to be paid by instalments and certain properties were charged with payment of those instalments the properties could not be sold in execution of the decree. 22 C. 859. A suit for enhanced rate of interest on an agreement to give time on condition of payment of higher rate of interest is not barred under S. 47. 32 C. 917.

CONCURRENT EXECUTION.—An order refusing execution at the same time against the person and property of the judgment-debtor is appealable. 7 B. 301.

CONSTRUCTION OF THE DECREE.—The question of the construction of a decree is one relating to execution. Therefore the question whether the actual execution of a decree is in excess of the decree itself, relates to execution. 10 M.L.T. 527—13 I.C. 133. The question whether certain villages were decreed or not, the decree not containing them, cannot be decided in execution. 6 A. 30 (*contra* 12 B. 449.)

CONTRIBUTION.—Any question of contribution which may arise by reason of the purchase by the decree-holder of some of the properties must be worked out not in execution proceedings, but in a separate suit properly framed and in the presence of all the necessary parties. 37 C. 13. When a portion of the money decree was sold *benami* for the debtors but the remaining creditors executed the whole decree on furnishing security, the debtors who had purchased can sue for their share, the decree having been satisfied. 15 C. 187. Claims for contribution by one judgment-debtor against another are not under S. 47. 18 A. 106.

COURT-FEES.—Where on a mortgage decree being put in execution, an objection was raised that execution Court could proceed only after payment of an additional amount of Court-fees but was negatived, *held* that an appeal lay as it was a matter relating to execution. 1922 P. 59—3 Pat. L.T. 146. A question as to the Court-fee payable before executing a partition decree when the decree itself imposed no such terms as to Court-fee, does not relate to execution. 29 B. 79.

DECRETAL AMOUNT.—An application to reopen execution proceedings on the ground that the decree-holder miscalculated the amount lies in execution proceedings. 5 C.W.N. 627 ; 6 B. 148 (*contra* in 10 C. 538).

DAMAGES.—A claim for damages by the auction-purchaser against the judgment-debtor and others for injury done to property after confirmation of sale must be enforced by a separate suit and not in execution proceedings. 31 M. 37 ; 2 Agra 105 ; 3 N.W.P. 187 ; 7 W.R. 45 ; 6 C.L.J. 527 ; 11 W.R. 516 ; 12 W.R. 85 ; 12 B.L.R. 201.

DELIVERY.—A question raised by the judgment-debtor regarding the delivery of more land than was actually sold, after confirmation of sale can be decided by a separate suit. 5 M.L.J. 256 ; 6 M.H.C. 304. Where in execution of a decree for delivery of possession of equity of redemption the decree-holder was wrongly given the delivery of land instead of equity of redemption, a suit by the mortgagee for the restitution of the land so delivered is not barred under S. 47. 5 P.R. 1907. Where in the course of execution the Court retained a box and jewels which were not the subject-matter of the decree, an appeal lay from an order dismissing a petition for delivery of possession of the same ; the question as to what should be done with them relates to the execution of the decree. 23 M. 55.

EXECUTION ALLOWING OR DISALLOWING.—An order dismissing objection to execution of a decree, for default is a decree within the meaning of S. 2 (2) and is appealable. 28 O. 81. The question whether a decree is executable or not is one under S. 47. 37 M. 29; 8 O.O. 361; 1 O.O. 289. An order dismissing an application for execution of a decree adversely affects the rights of the decree-holder against the judgment-debtor and is appealable. 4 L.L.J. 259=79 I.O. 546. When a decree is made incapable of execution by *vis major*, it can be enforced by a separate suit. 28 A. 1. An order negating the right of the decree-holder to proceed against the land of the judgment-debtor is one under S. 47. 2 L.L.J. 398=56 I.O. 173. An order refusing execution on the ground that the court had no jurisdiction to execute the decree does not fall under S. 47. 4 Pat. L.J. 46=52 I.O. 461. A question as to the legality of an executing Court's procedure or as to its jurisdiction or power to order a sale is a question falling under S. 47. 6 O.L.J. 640.

Execution of conditional decrees.—A obtained a decree for possession on payment of a certain sum within a certain time. The payment was made after the time and A applied for execution. Held that the question was one relating to the execution of the decree and hence an order allowing execution was appealable. 12 A.L.J. 12=22 I.O. 926. An order dismissing an application for execution for default of the decree-holder is not appealable. 4 Pat. L.T. 204=68 I.O. 337. An order dismissing the objection of the judgment-debtor to the execution of decree, for default is not appealable as a decree. It is merely an order relating to execution but it does not come within the definition of [S. 2 (2)] a decree. 1926 A. 401. The decision on a question whether a decree is executable or not is a decree under S. 47. An order that execution should issue and a commission be appointed for partition is a decree and is appealable. 37 M. 29.

Suit for injunction.—Where a person against whom suits were instituted, neglected to defend them, and after decrees had been passed, failed to take proper steps to get a retrial of the causes, and allowed the remedies offered to him to become time barred, he cannot thereafter be granted an injunction preventing the decree-holders from executing their decrees. 2 O.P.L.R. 75.

EXCESSIVE EXECUTION.—A complaint by the judgment-debtor that the auction-purchaser has taken possession of certain property not covered by the sale cannot be tried in execution but by a separate suit only. 64 I.C. 860; 25 B. 631. A question whether land taken in execution was included in the decree is one under S. 47. 12 B. 449; 7 O.O. 213; U.B.R. (1893-1900) Vol. II, page 249. Claims for excess of property taken in execution fall under S. 47. 38 A. 399; 22 W.R. 435; 14 A.L.J. 401; 22 O. 483; 2 A. 61 F.B.; 44 B. 97; A. W. N. (1906) 233; 9 A. 229; 12 M. 261; 13 M. 437; 13 B. 330; 14 C. 384; 21 C. 989; 17 A. 478; 63 P.R. 1901; 45 P.R. 1904; A.W.N. (1904) 55; 3 C.L.R. 181; 15 W. R. 160; 2 Agra 45; 4 O.L.R. 577; A.W.N. (1881) 79; 25 W.R. 183. Mistakes in execution proceedings should be rectified by the executing Court and no separate suit lies and a claim by a judgment-debtor to recover property over-delivered to the auction-purchaser who was a stranger to the suit is one coming under S. 47. 41 M.L.J. 120=69 I.C. 200.

PROPERTY NOT ENTERED IN THE LIST.—When a judgment-debtor makes an allegation that a certain property of his was seized in execution of the decree against him but that it was not entered in the list of properties seized and has not been returned to him by the decree-holder, the executing Court must hold an enquiry into the allegation on the execution side and if the judgment-debtor succeeds in establishing his allegations, the Court should direct the return of the property in species or direct payment of its money value to the judgment-debtor. 88 I.O. 1081=20 N.L.R. 90.

FRAUD.—When an order is obtained with fraud in execution proceeding it can be set aside only in execution proceedings. When a plaintiff in execution proceedings alleged fraud in respect of a compromise entered into by the parties subsequent to the decree the court should not refer him to a separate suit for the purpose. 6 B. 148 ; 9 B. 468 ; L.B.R. (1893—1900) 639. S. 47 is no bar to a suit to set aside a sale held in execution proceedings which were fraudulent. 24 I.C. 695. The question whether the decree-holder was induced by fraud to withdraw proceedings is under section 47. 6 B. 148 ; 18 O. 469. An auction-purchaser at a sale in execution of a decree against the transferee of occupancy holding can apply in execution for setting aside of a sale in execution of a rent decree against the recorded tenant on the ground of fraud. 4 I.C. 326—13 O.W.N. 98.

INJUNCTION RESTRAINING EXECUTION.—A suit to restrain a defendant from executing a decree obtained by him in the same Court and not a subordinate one against others contravenes the provisions of S. 56, cl. (b) of the Specific Relief Act. Such a suit is also not tenable under cl. (a) of the same section unless it is necessary to prevent multiplicity of proceedings. The injunction contemplated is not an injunction to the Court and the Court does not prohibit the grant of an injunction personally against the defendant from executing a decree or order, that person being amenable to the jurisdiction of the Court issuing the same. 18 M. 338. A person against whom a decree is obtained for recovery of possession of certain land from which according to the allegations of the latter, he had been wrongly ousted, cannot bring a suit for a perpetual injunction to restrain the defendant from taking possession of the lands decreed against him. The case does not fall under S. 54 of the Specific Relief Act as the plaintiff is not entitled to an injunction. 37 O. 731.

INSOLVENCY.—An objection to attachment by the judgment-debtor while the vesting order stood directing him an insolvent did not lie. 57 P.R. 1897.

LIMITATION IN EXECUTION PROCEEDINGS.—A decision on a question of limitation in execution proceedings is a decision within the purview of S. 47 and is appealable. 110 P.R. 1913. An order rejecting as time barred an application for the appointment of a commissioner to effect a partition is appealable. 28 M. 127.

MAINTENANCE.—The arrears due under a decree directing payment of an annuity could be recovered only in execution of the decree and not by a separate suit, S. 47 is a bar to the suit. A.W.N. (1883) 290.

MANAGEMENT OF THE PROPERTY IN EXECUTION.—When a decree in a partition suit directed that the defendant should manage certain property belonging to the *Devasthan*, and in case of mismanagement the plaintiff should manage the same, held that the question of mismanagement must be determined in execution and not by a separate suit, 22 B. 267 ; (*contra* in 12 O.W.N. 614). Questions as to the maladministration of a debtor's estate in execution are not under section 47. 35 C. 1100 ; 42 C. 1.

MESNE PROFITS.—An application for ascertainment of mesne profits is one in the suit. 16 O.L.J. 3—15 I.C. 709 ; 39 C. 220. An order of a Court fixing the mesne profits on a principle arbitrarily and without the production of evidence accordingly is one under S. 47. 29 O. 622.

Mesne profits for occupation.—Where a decree-holder purchaser is placed in possession and the sale is subsequently set aside and the properties are again proclaimed for sale, the right of the judgment-debtor to have the mesne profits for the period of the decree-holder's occupation of the property is a matter to be decided in execution proceedings and the judgment-debtor is entitled to have the same set off against the decretal amount. 7 Bur. L.T. 64—24 I.C. 468.

MISAPPROPRIATION OF ATTACHED PROPERTY.—Allegations of misappropriation of attached property (moveable property) by the decree-holder acting in collusion with the Court Amin, should be enquired into under S. 47 and the party complaining should not be referred to a separate suit. 1 Pat. L.J. 568—36 I.O. 280. The liability of a person, a repository in whose charge the attached property is placed, who has made a default to deliver the property or its value should be determined by a separate suit and not in execution proceedings. 42 A. 394 ; 47 I.O. 956.

MORTGAGE.—When an award and decree thereon for partition of immoveable property make no mention of the encumbrances created thereon by one of the parties, who are father and sons, and the mortgagees are no party to the proceedings, the executing Court is not competent to decide in execution of the decree, the respective liabilities of the parties as regards the mortgage. Such a question is a fit subject for a regular suit to be brought by the aggrieved party. 139 P.L.R. 1915—29 I.O. 755. A compromise decree was passed in a mortgage suit whereby the plaintiff agreed to leave the mortgagors-defendants in possession on condition of payment of a certain rent, and on default the plaintiff was to take possession. The defendants-mortgagors having made a default, the plaintiff applied to be put in possession. Again, a compromise was arrived at on the same terms with a variation of reduction of rent. The plaintiff was held not entitled to bring a separate suit to execute the decree. 2 L. L.J. 724. A question whether the mortgagor had mortgaged more than he had a right to mortgage is one relating to the execution, etc. 79 I.O. 486—1923 A. 115.

REDEMPTION.—A mortgagee sued for recovery of possession of immoveable property mortgaged by right in *ijara* and obtained a decree for possession with a right to be in possession thereof, so long as the money for which the properties were mortgaged were not repaid out of the income arising from them, held that it was a decree in a suit for ejectment and that a second suit for redemption was not barred under S. 47. 19 O.W.N. 1132—32 I.O. 59. In 1888 the plaintiff obtained a redemption decree which provided that on plaintiff's default to pay the whole of the decretal amount by the end of March 1893 his right to redeem for ever should be barred. The decision was passed under the provisions of the Deccan Agriculturists Relief Act, 1879 ; nothing was done under the decree. The plaintiff then filed another suit in 1913 to redeem the mortgage. Held that the second suit could not lie by reason of S. 47 of the Code inasmuch as the decree in the first suit which was passed before the T. P. Act came into force in the Bombay Presidency and which did not require any order absolute, was capable of execution and its execution was time barred long before the institution of the second suit. 43 B. 709. When a decree *nisi* is passed in a mortgage suit allowing the defendant mortgagor or the transferee of his equity of redemption, a period of 6 months to redeem the property and the decree is not made absolute the latter are not barred to bring a separate suit for redemption of the property as the mortgagor or his assignor was not in the position of a decree-holder to execute the decree and get the property redeemed. 39 B. 41.

PUISNE MORTGAGEE.—When a puisne mortgagee was a party to the suit by the prior mortgagee and a decree was passed under S. 68 of the T.P. Act, which made no mention of the puisne mortgagee's right to redeem, and the property was sold privately after an order absolute, a suit by the puisne mortgagee was maintainable and not barred by S. 47. 49 I.C. 466—(1918) M.W.N. 902. When to discharge a decree on a prior mortgage in a suit brought without impleading the puisne mortgagee as a party, the mortgagor executes a third mortgage, the third mortgagee is entitled to a priority over the puisne mortgagee and S. 47 is no bar to a suit brought by him to enforce his mortgage. 82 I.O. 846—20 L.W. 651.

NEGLIGENCE OF JUDGMENT-DEBTOR.—A decree-holder cannot make the judgment-debtor liable in execution for negligently allowing the decreed house to be burnt down. 33 I.C. 520.

ORDERS PRELIMINARY TO THE INSTITUTION OF THE SUIT, ETC.—An order passed on an application preliminary to the institution of the suit itself, such as an application for leave to sue and proceedings passed in execution in regard to such orders as well as orders granting day costs do not fall within the scope of S. 47. 13 M.L.T. 447 ; 29 I.C. 393.

PARTITION.—When in a suit for partition and accounts between co-sharers, the liability of some of the defendants is determined and a decree is passed against them not only in favour of the plaintiff but also in favour of one of the defendants in the suit, a fresh suit cannot be maintained by that defendant for enforcing his claim under that decree. The remedy is by way of execution and not by another suit. 57 I.C. 900. Where in a suit for partition A's father got a decree representing his branch then consisting of himself and his minor son, A being a party to the suit, and subsequently entered up satisfaction of the decree which was held by the Privy Council not to be binding against the son, the compromise being without the leave of the Court; *held* that the proper remedy of A was to move by application under S. 47 to reopen the satisfaction entered up and on such application the Court could grant him all the appropriate reliefs. 24 I.C. 696—36 M.L.J. 460. In a partition suit, a compromise decree was passed by which amongst other things certain debts were allotted to A and certain others to B and A was to receive a certain sum of money. On an application for execution of the decree it was pleaded that decree-holder had realised certain debts which had not been allotted to him, *held* that the plea could not be raised in the execution department. 35 A. 243 ; 11 A.L.J. 282. When partition was effected in execution proceedings, a suit for objections to such partition does not lie. 126 P.R. 1879. When a decree-holder purchased in execution sale the share of the judgment-debtor who was a member of a joint Hindu family and subsequently brought a suit for partition *held* that S. 47 does not give the executing Court power to effect a partition and that the fresh suit was therefore necessary and competent. 1 L. 134 ; 29 M. 294. 31 A. 82 F.B. ; 15 M. 226. When a partition in interest is once effected by a decree between the co-parceners a suit and not an application under S. 47 is the proper procedure whereby to obtain partition by metes and bounds. Such a decree is merely a declaratory decree converting the parties into tenants in common. 6 Bom. L.R. 35. An enquiry as to which are the lands substituted in lieu of the shares in partition proceedings relates to execution under S. 47. 20 A.L.J. 650—43 M.L.J. 124 P.C. A question whether a decree-holder is entitled to a share substituted by partition for the one decreed falls under S. 47. 40 I.C. 508—(1917) Pat. 205. When under a partition decree one co-sharer is directed to pay a sum of money to others in order to compensate the latter on account of an excess portion allotted to the former, the remedy of those to whom payment is directed to be made is by way of execution of the decree ; a separate suit for the recovery of the amount is not competent, as it is not a charge on the property. 1926 O. 230—91 I.C. 1009. Where a decree directs the separation of the plaintiffs' share only and leaves the shares of the defendants joint, a separate suit by the defendants *inter se* for separate possession of shares is not barred. (1926) Pat. 154—90 I.C. 739. An executing Court cannot, on a mere application for execution by a Court auction-purchaser enforce his rights by an order for partition. 1926 M. 332—91 I.C. 961. An order on an application for the appointment of a commissioner to work out the shares recoverable under a compromise decree for partition is not appealable. (1915) M.W.N. 725—2 L.W. 893. An order passed in a suit for partition subsequently to the preliminary decree appointing a commission to make the partition is not appealable under S. 47. 24 O. 725.

PRE-EMPTION.—A usufructuary mortgagee who was also a co-sharer brought a suit, on a sale by the mortgagor, for pre-emption without asking for possession, obtained a decree, and paid the money into Court which was received by the vendees. The decree was never executed; *held* in a suit by the mortgagee pre-emptor that the plaintiff himself being in possession *qua* mortgagee, it was not necessary for him to seek any further reliefs in execution of the pre-emption decree under O. 21, r. 36 and that a suit for a declaration of his title is not barred by S. 47, C. P. Code. 12 A.L.J. 521=23 I.C. 876.

PAYMENT OF AMOUNT DEPOSITED.—The order of the Court allowing the pre-emptors to withdraw the money deposited by them in Court for the vendee, on the ground that the sale had been declared to be invalid as against reversioners in a separate suit is an order under S. 47 and an appeal from such order lies. The vendee is entitled to refund of the money so paid to the pre-emptor. 76 P.R. 1902.

POSSESSION.—Where in pursuance of a decree for possession the judgment-debtor amicably hands over possession to the decree-holder but subsequently dispossesses him, the remedy is by way of a fresh suit and not by way of execution of the prior decree for possession. 30 I.C. 606. Where by a compromise in a suit a decree was passed by which the defendant admitted the plaintiffs' right to the house in dispute but was allowed to remain in possession as a tenant and the defendant further agreed to vacate the house, whenever asked to do so, it was *held* that the relation of landlord and tenant commenced to exist immediately after the compromise, but the decree was practically executed by the creation of the relationship of landlord and tenant and that the defendant could not be ejected except by a suit properly framed. 12 A.L.J. 31=22 I.C. 663. Question relating to delivery of possession to the purchaser relate to execution, though they may not be strictly a part of execution. 1926 C. 798=30 O.W.N. 649. A suit for possession by one of the judgment-debtors against the auction-purchaser in execution of the decree against the other judgment-debtor is not barred by S. 47. 1926 N. 68=91 I.C. 218. An order granting possession to the decree-holder and disallowing objections put forward by the mortgagees and tenants is not appealable. 39 I.C. 772=78 P.W.R. 1917.

Actual and symbolical possession.—There is nothing in the law to prevent a suit for actual possession by a person who has obtained symbolical possession under O. 21, r. 36. 3 W.R. Mis. 2. A person who obtained a decree for immoveable property in the occupancy of the judgment-debtor and who in execution of that decree has taken mere formal possession of such property is entitled to bring a fresh suit to compel the same judgment-debtor to deliver up the actual physical possession of the property. 11 O. 98; 8 O.W.N. 49; (see also 24 C. 715; 5 A.L.J. 35). A question between an auction-purchaser and the judgment-debtor with reference to the possession of the property sold under the decree is not covered by S. 47. 22 A.L.J. 1119=84 I.C. 746. The question relating to the delivery of possession to the auction-purchaser is not one relating to the execution of the decree or between the parties to the suit or their representatives, and hence a suit for possession is not barred. 84 I.C. 525=1923 O. 345. When a decree awards possession of property to a person he should proceed in execution. A subsequent suit for declaration of title is barred by S. 47. 1 Pat. 157=1922 P. 407. When in the course of execution proceedings the decree-holder got possession of the property though not through the Court officer and was subsequently dispossessed by the judgment-debtor, a suit to recover possession is maintainable. 68 I.C. 744; 38 A. 509. Where a decree for possession of property was passed on payment of a certain amount and the plaintiff paid the amount but did not get the possession within time allowed, he could not maintain a separate suit for possession. 18 A.L.J. 1001=59 I.C. 632. When a defendant admits the right of the plaintiff to possession after the decree is passed and pays off all costs of the suit to him a fresh suit by the

plaintiff is not barred when the defendant sets up an adverse possession. 20 A.L.J. 619—1922 A. 411. When property is sold in execution but the judgment-debtor had no interest in the property sold, a suit will lie against the auction-purchaser for the recovery of the same. 75 I.C. 238—L.R. 4 A. 528. Proceedings for delivery of possession of property purchased by the decree-holder are proceedings within the section. 35 B. 452. Plaintiff's right to take out execution for a greater quantity of land than he had originally sued for should be enquired into under S. 47. 9 A. 929.

REFUND.—When in execution of A's decree against B, C's property was sought to be attached but C paid the amount named in the warrant of attachment he could bring a regular suit for refund of the money. He could not apply under O. 21, r. 88, because there was no attachment. 9 S.L.R. 243—34 I.C. 492.

RENTS AFTER INSTITUTION OF SUIT.—Questions relating to rents collected after the institution of a suit for partition do not fall within S. 47 and a separate suit must be brought for the same. 29 I.C. 905.

RESTORATION OF EXECUTION.—Although against an ordinary interlocutory order in the course of an execution proceeding an appeal does not lie under S. 47 of the O.P. Code, yet an appeal lies where the order is one which in substance determines a question relating to execution between the decree-holder and the judgment-debtor, e.g., where it has the effect of reviving an application for execution which was dismissed for default of the decree-holder especially when a fresh application by the decree-holder would have been barred by limitation. 57 I.C. 905.

REVERSIONER'S RIGHT TO CONTEST ALIENATION.—A reversioner's right to bring a suit for a declaration that the decree against the widow was not binding on him is governed by Art. 120 of the Limitation Act and S. 47 has no application to such cases. 30 M. 402.

SALE—Objection to sale.—An order passed on an application by a judgment-debtor objecting to the sale of certain immovable property in execution of a decree is as between the parties to the suit an order passed under S. 47 and is appealable even though it also disposes of objections made by third parties to the delivery of possession. 31 I.C. 102; 32 I.C. 769—39 M.L.J. 629. When an objection to a sale in execution of a decree is allowed, the decree-holder if aggrieved thereby has his remedy by way of an appeal and a second appeal and if he omits to appeal the order of the executing Court is final and binding upon the parties. S. 47 forbids the institution of a regular suit to avoid the consequences of such an order. 51 I.C. 184—17 A.L.J. 832. Questions relating to validity of sale are matters relating to the execution of the decree. 9 I.C. 584—13 C.L.J. 162; 16 M. 447. Questions relating to non-transferability of a holding fall under S. 47. 1 Pat. L.T. 267—56 I.C. 676. Questions relating to the saleability or otherwise of an occupancy holding is to be determined in execution proceedings. 27 C. 415; 27 C. 187. Sale of the mortgaged property in favour of the mortgagee is to be determined in the execution proceedings, and not by a separate suit. 41 M. 403 P.C. A suit for sale of the mortgaged property after a decree to that effect is not maintainable. 24 C. 473; 12 C.W.N. 614—35 C. 1100; 28 M. 224.

Setting aside sales.—When objections in a petition to set aside an execution sale relate not only to material irregularity in publishing or conducting the sales but go further and include objections to the whole procedure starting with illegal attachment, the petition is admissible under S. 47, O.P. Code, and is not time barred though filed beyond 30 days allowed for an application under O. 21, r. 90. 10 Bur. L.T. 279—37 I.C. 827; 33 I.C. 692; 21 O.C. 317—49 I.C. 39. But if the objection is by a third party Art. 166 applies and the time limit is 30 days. 46 C. 975. When a

decree is set aside, a sale held in execution of that decree can be set aside under S. 47 as having no longer been based on any solid foundation. 43 B. 235; 25 O. 175. Confirmation of sale is no bar to an application by the judgment-debtor for a declaration that a holding could not be sold in execution, the question being one relating to the execution, discharge or satisfaction of the decree. 26 C. 727; 14 M. 447. Confirmation of sale may be refused by the executing Court on the ground that the decree in execution of which the sale took place was not subsisting at the date when the confirmation was applied for. 25 O. 175. The fact that the purchaser, a stranger to the suit is interested and concerned in the result of the suit does not bar the applicability of S. 47. 19 O. 683 P.C. When a property is sold in execution of an *ex parte* decree which is subsequently set aside the executing Court can go into the question as to the validity of the sale and set it aside. 3 C.W.N. 6. An order setting aside a sale under S. 173 of the B. T. Act on the ground that the auction-purchaser is benamidar of one of the judgment-debtors is not appealable. 46 I.C. 748; 33 I.O. 574. An order granting an application for setting aside the execution sale in terms of the agreement and ordering the judgment-debtors to deposit the surplus sale proceeds taken by them at once for payment to the person applying for setting aside the sale is not appealable. 45 I.O. 93. An application by the purchaser for setting aside a sale on account of deficiency of area does not lie. 27 O. 264; 20 C. 8.

SATISFACTION OF THE DECREE.—An application by the transferee of the judgment-debtor (mortgagee) after the decree on a mortgage but before sale, that the sale in execution of the decree was fraudulent and brought about by collusion between the decree-holder and the judgment-debtors (who had parted with their rights) and that the decree had been satisfied before the sale and that the execution application of the decree-holder was barred by time falls within S. 47 and an order thereon is appealable. 21 I.O. 938=18 C.L.J. 264. An application by the decree-holder to set aside an order entering up satisfaction of the decree on the ground of fraud of the judgment-debtor is maintainable. S. 47 bars a regular suit. 57 I.O. 898. Questions relating to the satisfaction of the decree fall under S. 47. 43 B. 240. The contention of the judgment-debtor that he was entitled to deduct a larger sum than allowed by the decree-holder on account of the transfer of certain properties of him to the decree-holder and that the interest was erroneously claimed at a higher figure than what was due and the question as to the date on which credit ought to be given for the consideration money for the transfer are questions within the meaning of S. 47 and the executing Court must not decline to investigate into them. No separate suit lies. 9 I.O. 382.

QUESTIONS ARISING AFTER SATISFACTION OF THE DECREE.—Where only two out of four legal representatives objected to the sale which was dismissed and the decree was fully satisfied, the executing Court became *functus officio* and the separate suit by all the representatives for a declaration that the property was not liable to sale was maintainable. 60 I.C. 516. When a judgment-debtor objected that the auction-purchaser had taken possession of property to which his sale certificate gave him no title, it was held that the question in dispute should be decided by a separate suit and not under S. 47. 31 A. 82. 6 A.L.J. 71; 5 M.L.T. 185; 1 I.O. 416; 10 I.O. 714=14 O.C. 70. When a decree has been satisfied it prevents an application under S. 47. 1 C.W.N. 708; 16 W.R. 269; 7 O. 91; 1 S.L.R. 172; 10 C. 538; 63 P.R. 1901.

SCHEME SUITS.—When a plaintiff in a scheme suit, which resulted in a decree of the High Court, presented a petition to the Court below referring to the respondent's Dharmakartas' failure to comply with the provisions of the decree as regards certain matters, and asking for his removal, but did not ask for any of the reliefs which could

be granted in execution and the Court below declined to remove the respondent, *held* that the order so declining was one passed in execution of the decree and that it was appealable under S. 47, C.P. Code. (1917) N.W.N. 420=38 I.C. 415. An order of a Court on a petition presented to it under scheme clause sanctioned by a decree for the management of a Hindu temple, appointing a trustee, a vacancy having occurred, is one under S. 47. 75 I.C. 189=(1923) M.W.N. 664. An appeal lies from an order of a single Judge on the original side deciding the question as to election of a trustee of a mosque under a scheme framed by a Court, as the proceedings are in the nature of proceedings in execution of the decree passed on the scheme suit. 7 Bur. L.T. 298=24 I.C. 915. Applications in execution of a scheme of management of trust do not come under S. 47. 1926 M. 655=(1926) M.W.N. 283; 1925 P.C. 155; 1926 M. 130=92 I.C. 556.

STAY OF EXECUTION.—See under O. 21, r. 26 and O. 41, r. 5, in this chapter. An order directing that no warrant of attachment should issue by a certain date is not appealable. 101 P.L.R. 1911=64 P.W.R. 1911.

SUBSISTENCE OF THE DECREE.—An order refusing to confirm a sale on the ground that the decree in execution of which the sale took place, was not subsisting at the date when the confirmation of the sale was applied for falls under S. 47. 27 C. 175. When the *ex parte* decree is subsequently set aside, the sale effected in execution of it may be enquired into by the Court and set aside under S. 47. 3 C.W.N. 6. A question that a sale should be set aside on the ground that the decree was set aside before the sale is under this section. 6 O.L.J. 102.

SUCCESSION CERTIFICATE.—An order requiring a certificate from the decree-holders to recover the debt is not a decree under S. 47. 8 A.W.N. 82.

SUITS—QUESTIONS IN THE.—This section has no application to a substantive question in the suit itself. 4 A 420. It contemplates questions relating to the enforcement of the obligation created by the decree and relates to matters arising subsequent to the passing of the decree, and not antecedent to it. 6 C.W.N. 796; 11 M. 413.

SUIT ON THE BASIS OF THE DECREE.—After the execution of the decree is barred by time, a second suit on the basis of the former decree is not maintainable. 18 A.L.J. 1001=59 I.C. 632.

TERMS OF THE DECREE.—A suit to recover property wrongly included in the decree is not barred. 22 A. 442. If the executing officer acts contrary to the terms of the decree, he is not acting in execution and a separate suit lies to set aside such proceedings. 11 W.R. 516; 5 P.R. 1907; (*contra* in 22 C. 483; 5 M.H.C. 155). Where the decree-holder gets possession of the land not included in the decree otherwise than through the officer of the court, such possession and the question relating to it do not relate to the execution of the decree and may be made the subject of a separate suit. 12 W.R. 85; 23 M. 55; 5 M. 185; 12 B.L.R. 201; 6 C.L.R. 527; 7 O.C. 213. In a suit to set aside a Revenue sale for fraud a compromise was entered into by which the defendant agreed to execute a kobala within three months and in default the plaintiff was to get the same executed by Court. The plaintiff could not bring a separate suit for getting the kobala; the proper remedy was by execution of the decree. 23 I.C. 240.

VALIDITY OF THE DECREE.—Questions as to the validity of the decree are not under S. 47. 22 B. 475; 27 M. 118; 28 M. 26; 30 M. 26; 32 C. 265; 21 A. 277; 21 A. 356; 9 M. 80; 23 C. 639; 30 M. 402; 31 C. 179; 12 M. 503. S. 47 does not apply when the objection is to the decree itself and not merely to the execution, discharge or satisfaction of the decree. 19 A. 480; 21 A. 277; 25 C. 133; 30 M. 26; 9 M. 80.

Questions as to the decree being collusive cannot be tried in execution proceedings. 20 N.L.R. 24=78 I.C. 136. When a sale is to be set aside on the ground that the decree was obtained by fraud, a separate suit lies and the case is not governed by S. 47. 21 O. 605; 9 M. 80; 12 O.P.L.R. 82; 5 O.L.J. 328; 29 O. 546; 26 O. 326; 27 O. 197; 42 O. 248 P.C.; 5 O.L.J. 328; 7 I.C. 11; 24 O. 546; 28 O. 475 P.C.; 15 O. 179; 6 O.W.N. 478; 5 O.W.N. 559; U.B.R. (1905) 4th Qr., O.P.O. 36; 55 I.C. 512. Every order or judgment however erroneous is good until discharged or declared inoperative. An enquiry into the validity of a decree is outside the powers of an executing Court subject to the proviso that there is a valid decree in existence which can be executed. 82 I.C. 255; 44 O. 627; 1926 A. 387. The objection that the decree was passed without jurisdiction cannot be taken in execution proceedings. 29 O. 810; 31 O. 179; 30 M. 402; 14 O.L.J. 50=10 I.C. 532; 1926 M. 128=91 I.C. 98. But when jurisdiction is assumed by an executing Court in passing an order against which an appeal would lie, an appeal against the order cannot be defeated by showing that the order was made without jurisdiction; so where a Court purporting to act under S. 47 directed execution to proceed against a minor and an appeal was preferred on the ground that the decree sought to be executed did not bind the minor it was held that the fact that on the appellants own showing the minor was not a party to the decree would not make the appeal incompetent. 15 O.W.N. 725=8 I.C. 26. An objection that the decree is obtained against a dead man without substituting his heirs and as such execution could not proceed should be gone into in execution proceedings under S. 47. 2 Pat. L.J. 192. Where a decree is passed against an unrepresented minor on the footing that he was a major, the objection of the minor to execution on the ground that the decree was a nullity may be treated as a suit and enquired into. 1926 A. 387; such an objection should not be gone into in execution proceedings (*ibid*). 31 A. 572; 28 A. 585; 35 A. 487. S. 47 has no application to the case when the judgment-debtor tries to set aside the effect of the decree itself. In the case of a mortgage decree, the decree itself directs the sale of the property, and if objection is taken that the property cannot be sold because it belonged not to the judgment-debtor but to a stranger to the suit, the propriety of the decree is called in question. A question of this description must be tried in a regular suit and not in the execution proceedings which are based on the assumption that the decree is a good and valid decree. 6 O.L.J. 20. A separate suit lies to set aside an *ex parte* decree obtained by fraud. 55 I.C. 512. A minor is not entitled in the execution proceedings to set up the plea that the decree obtained against him is a nullity being without proper representation. 7 O.C. 199; A.W.N. (1905) 122; 17 M. 316. S. 47 does not apply to a suit to set aside a decree and sale thereunder on the ground that they had been obtained by fraud. 42 O. 244 F.B. When a money decree was lost or destroyed the existence of the decree and its terms should be enquired into in execution and not by a separate suit. 1 Agra 78.

WASTE.—Where a decree for possession was passed in favour of the plaintiff, of property in dispute, and an appeal was filed by the defendant which was eventually dismissed, but the defendant had meanwhile committed waste by cutting trees, the application by the decree-holder for ascertaining the damages alleged to have been committed by the judgment-debtor falls under S. 47 and must be determined in execution and not by a separate suit. 25 Bom. L.R. 449=73 I.C. 443.

WITHDRAWAL OF EXECUTION PROCEEDINGS.—An order allowing the decree-holder to withdraw the execution proceedings does not determine any question between the parties to the suit relating to the execution, discharge or satisfaction of the decree within the meaning of S. 47. 19 I.C. 904=18 O.L.J. 53. An application by the decree-holder to dismiss his execution case does not fall under S. 47. But if the appellate Court assumes jurisdiction and sets aside the order of the lower Court, a second appeal is competent. 57 I.C. 396.

WHETHER A PERSON IS A REPRESENTATIVE OF A PARTY TO THE SUIT.—The determination of a question arising between a decree-holder or his representative and a judgment-debtor as to whether any person is or is not the representative of a party amounts to a decree and is appealable as such. 82 I.C. 604. When during the course of execution proceedings, the decree-holder dies, the question as to who is the legal representative of the deceased entitled to execute must be decided by the executing Court. L.R. 3 A. 473 (Rev.). Under S. 47 the Court does not purport to conclusively determine the controversy as to who is the representative; such an order if passed although within S. 47 is not appealable. 43 I.C. 165—11 S.L.R. 74. When a person applies to be brought on the record as the representative of the judgment-debtor so that he may raise a question to be decided by the executing Court under S. 47, O.P. Code, the proper Court for entertaining the application is the Court executing the decree. 55 I.C. 812—11 L.W. 173. When a decree-holder has died and some persons appear asking to be allowed to execute the decree as representing the deceased, the Court should decide who is the legal representative of the deceased person. 1926 S. 113—92 I.C. 575. Under the old Code it was competent to the Court to stay proceedings in execution until the question as to who is the legal representative of the party was determined by a separate suit or itself could determine the question. Under the present Code, it is obligatory upon the Court executing the decree itself to determine the question. 16 A. 483; 25 M. 545; 29 O. 670; 2 Pat. L.J. 192—39 I.C. 172; 17 A. 244; 8 M.L.J. 37; (1912) M.W.N. 410; 15 I.C. 224; 17 A. 431; 28 M. 466 F.B.

SUB-RULE (2).—When it appeared that the reliefs claimed in the plaint could not under the section be asked for in a separate suit it was competent to the Court to meet the plaint as an execution petition. 1 I.C. 380—6 M.L.J. 325; 4 M.L.T. 288; 22 A. 121; 22 O. 483; 19 W.R. 20; 14 O. 605; 28 M. 64; 22 Bom. L.R. 670—58 I.C. 231; 1926 A. 387. Sub-S. (2) is new in the Code of C.P., 1908, and it is enacted to give legislative recognition to the practice followed by Courts under the old Code. When a regular suit is instituted for the determination of a question for which a regular suit is barred under S. 47, the Court in which the suit is brought may either dismiss the suit as barred under S. 47 or it may in its discretion regard the plaint in the suit as an application under S. 47 and dispose of it accordingly, provided the Court in which the suit is brought had jurisdiction to execute the decree and the execution of the decree was not barred by time at the date of institution of the suit. 22 A. 121; 26 A. 101; 29 A. 348; 32 M. 425; 35 B. 452, 461. A suit entertained and decided by a Court wrongly against the provisions of S. 47 is not liable to be set aside by the appellate Court, if the decree is otherwise good in law, as there is no absence of jurisdiction but only error of procedure. The appellate Court may regard the plaint in the suit as an order under S. 47, provided the Court which passed the decree had jurisdiction to execute the original decree. 14 O. 605; 22 O. 783; 28 M. 64; 32 O. 332. It has been held by the Madras High Court that even a written statement may in a proper case be treated as an application under this section. 4 L.W. 400—34 I.C. 747; 45 I.C. 608. Where the decree in a suit for specific performance of a contract of sale was satisfied by execution of registered deed of sale, and the decree-holder instead of suing for possession of the property under the sale-deed, took out execution for possession held that under S. 47 (2) of the C.P. Code, the applicant should be allowed to convert the application into a plaint for possession by paying the required Court-fees thereon. 40 P.L.R. 1913—18 I.C. 700. Where a party instead of applying under S. 47 applied under O. 21, r. 58 and the objection being disallowed sued under O. 21, r. 63 it was not a case, in which the plaint could be treated as an application under S. 47. 20 A.W.N. 196. When a minor objected to the execution of a decree passed against him, being unrepresented on the footing that he was a minor, his objection may be taken as a proceeding in a suit and the Court may grant him a declaration that the decree was a nullity. 1926 A. 387. Where a suit is asked in appeal to be treated as an application under S. 47, the

Court should refuse the request if the plaint was not presented to the executing Court. 1926 L. 165=7 L. 1.

DISCRETION.—In the face of S. 47 (2) it is not permissible to a Court to dismiss a suit on the ground that the remedy of the plaintiff was by way of execution. The mere fact that the Court which decided the suit would have had no jurisdiction to determine the matter in execution is not a sound reason for not treating the suit as an application for execution. 18 M.L.T. 247=30 I.C. 783. It is a matter for the discretion of the Court to treat an application under S. 47 as a suit and it may refuse such discretion in favour of an applicant whose conduct has not been *bona fide*. 27 I.C. 570. It is open to an appellate Court to treat proceedings arising out of an application under S. 47 as proceedings in a suit and grant the necessary relief. 1926 A. 387. When instead of making an application, to set aside a sale, to the Collector (who effected the sale) a suit is brought by the judgment-debtor, the suit cannot be treated as an application under S. 47 when the Court in which the suit is instituted is not the Court executing the decree at the time when the decree is made over to the Collector. 35 I.C. 473.

PROCEDURE TO BE FOLLOWED IN INVESTIGATION UNDER S. 47.—S. 47, O. P. Code, does not prescribe the procedure to be followed in the case of a claim preferred by a party to the suit. In such a case regard must be had to the provisions of O. 21, rr. 58—63. O. 21, r. 63 may possibly be construed as substituting a right of suit for a right of appeal to the aggrieved party in the cases of claims or objections by parties to suits. 37 M.L.J. 624=55 I.C. 586.

APPEALS FROM ORDERS IN EXECUTION PROCEEDINGS—TEST WHETHER AN ORDER UNDER S. 47, IS APPEALABLE.—The determination of any question within S. 47 is a decree within the terms of S. 2 (2), O. P. Code. 39 I.C. 374=2 U.B.R. 139; 8 N.L.R. 177; 17 O. 769. Whether an order under S. 47 is a decree within the meaning of S. 2 (2), depends on the nature and contents of the order. 14 O.L.J. 35; 13 O.L.J. 535. The order must determine the rights of the parties with regard to all or any of the matters in controversy in the suit. 56 I.C. 452; 24 O. 725; 22 I.C. 548; 45 I.C. 192. The provision of the law quoted by the Court passing the order is not conclusive in determining whether an order is appealable or not. (1913) M.W.N. 382=19 I.C. 448. The order must not be an interlocutory order which does not conclusively determine the rights of the parties in controversy in execution. 16 C.W.N. 124. Every order passed by the execution Court is not appealable, but only such orders as determine the rights of the parties to the execution with regard to all or any of the matters in controversy in the suit are appealable. 1926 A. 268=92 I.C. 644; 14 C.L.J. 489; 24 O. 725=17 C.W.N. 1240. The determination of any question within S. 47 is a decree under S. 2 (2), O.P. Code. 37 M. 29. When the question is one relating to execution, discharge or satisfaction of the decree and falls under S. 47, an appeal lies from an order deciding such question. When the order of remand involves a cardinal point in the case it is final and appealable. (1918) Pat. 81=45 I.C. 192. An order which is passed without jurisdiction is a nullity and may be disregarded and need not be set aside. But an erroneous order made by a Court having jurisdiction can only be set aside by review or appeal. 21 C.W.N. 1052=42 I.C. 623.

ORDERS IN EXECUTION NOT APPEALABLE.—Ministerial orders in execution proceedings are not appealable. A.W.N. (1887) 134; 9 A. 500. Every order between the decree-holder and the judgment-debtor under S. 47 is not a decree and appealable as such. An order under O. 21, r. 92 is an order appealable under O. 43, r. 1 (j) and not being a decree, no second appeal lies therefrom. 1926 O. 400=90 I.C. 228.

APPEAL FROM INTERLOCUTORY ORDERS.—An appeal need not be preferred from every order in execution proceeding. It is open to the party aggrieved to

challenge in appeal against the final order which determines the rights of the parties, the propriety of the interlocutory orders made in the course of the proceedings. 36 C. 422; 18 C. 469; 5 I.C. 489.

APPEAL FROM A PREVIOUS ORDER WITHOUT ATTACKING THE SUBSEQUENT ORDER.—When the law gives a person two remedies he is entitled to avail himself of either of these unless they are inconsistent. When two orders are passed in execution, the second after and in consequence of the first and the statute gives a right of appeal against both, an appeal is competent against the first order alone, even though the second order has been passed before the filing of the appeal itself; and if the first order is reversed in consequence, the second order will *ipso facto* cease to have effect. 37 M. 29.

ORDER IN EXECUTION BY A SMALL CAUSE COURT.—No appeal lies from an order of Small Cause Judge passed in execution of the decree. W.R. 1864 Mis. 38.

EXECUTION IN THE DECREE OF A SMALL CAUSE COURT.—When a decree of a Small Cause Court is transferred to the District Munsiff's Court for execution against the immoveable property of the judgment-debtor, and on an objection raised execution was held to be barred, an appeal lay from the order to the District Court. With regard to the first appeal the question ceases to depend upon the character of the tribunal and upon the nature of the claim. 11 M. 130.

SECOND APPEAL.—**Suit of a Small Cause Nature.**—No second appeal lies in the case of execution of decree of the Small Cause Courts. 5 L.W. 701; (1911) M.W.N. 535; 16 C.L.J. 96; (1917) Pat 30; 11 M. 130. No second appeal lies from an order in execution in a suit of the nature cognisable by a Small Cause Court when the value of the subject-matter of the suit is less than Rs. 500, whether the execution proceedings are taken in the Court which passed the decree or in that to which the decree may have been transferred for execution. 12 A. 579; 12 A. 581; 18 A. 481 F.B.; 25 C. 872; see 23 M. 547 F.B.; 12 M. 116.

Appeals under Act V of 1903.—Under Act I of 1879 as amended by Act V of 1903 (Chota Nagpur Landlord and Tenant Procedure Act), no second appeal lies from an order passed in execution. 33 C. 378.

PROCEDURE APPLICABLE TO APPEALS.—An execution proceeding is a proceeding in the suit and a formal decision on a point under S. 47, O.P. Code, is a decision in the suit *inter partes* and the procedure in an appeal therefrom is that laid down in O. 41. When therefore there is a judgment and a decree based thereon on a question within S. 47, no valid appeal is filed by presenting a memorandum of appeal without a copy of the decree. 40 A. 12.

ORDER IN EXECUTION OF A DECREE UNDER S. 9, SPECIFIC RELIEF ACT.—No appeal lies against an order passed in execution of a decree made under S. 9 of the Specific Relief Act as the term "suit" in the section includes an execution proceeding on the basis of the decree. 45 C. 519; 5 P.W.R. 1917; 26 C.L.J. 325; 25 M. 438; 45 P.L.R. 1915; 20 C.L.J. 485. An order in execution of such a decree is not appealable even if the order is one directing the arrest of the judgment-debtor for realising costs. 5 P.W.R. 1917—8 P.L.R. 1917.

VALUATION FOR PECUNIARY JURISDICTION.—When an original suit out of which execution proceedings had arisen was valued at more than Rs. 5,000, but was decreed for less than that amount, an appeal from an order in the execution proceedings would nevertheless lie to the High Court. 31 I.C. 496; 40 C. 55. When the original suit was valued at less than Rs. 5,000, and an order in execution was made respecting

the amount of mesne profits made payable by the decree exceeding Rs. 5,000, it was held, that an appeal lay from the order of the Subordinate Judge to the District Court and not to the High Court. A.W.N. (1886) 286 ; N.W.P. (1873) 108 ; 9 B.L.R. 199. Though subject of a suit in the Court of first instance is below the value of Rs. 10,000, yet an order of the High Court on a question raised in execution of the decree in such suit would be appealable to the Privy Council if it involves a claim on a question relating to property of a value exceeding Rs. 10,000. 3 A. 633 F.B. When the holder of a decree passed by the Court of a District Munsiff attached in execution thereof under O. 21, r. 52, a sum of money which had been realised in execution of another decree which was in favour of the judgment-debtor under the former decree and also obtained an order from the Sub-Court for payment of the same to him, an appeal lay to the District Court against the order of the Sub-Court, as all the questions involved in the proceedings must be as between the decree-holder and the judgment-debtor in the decree of the Munsiff's Court in their capacity as such, 5 L.W. 264=38 I.C. 772. If the appeal is preferred to the High Court it must be returned for presentation to the proper Court and not dismissed. 5 L.W. 264=38 I.C. 772.

RIGHT OF APPEAL AND CHANGE IN LAW.—The general principle is that a right of appeal newly given by law is made applicable to proceedings instituted before that change in procedure is made. 16 O. 429.

REVIEW.—When an order for attachment is made by a competent Court on an application for execution of the decree, the Court has no power to set aside the order by way of review, if no application for review is made within the period of limitation. The successor in office of the Judge who made the order cannot entertain the application for review. 18 I.C. 841=17 C.L.J. 125.

CHAPTER X.

RATEABLE DISTRIBUTION.

PROCEEDS OF EXECUTION SALE TO BE RATEABLY DISTRIBUTED.—

Where assets are held by a Court and more persons than one have before the receipt of such assets made application to the Court for the execution of decrees for payment of money passed against the same judgment-debtor, and have not obtained satisfaction thereof, the assets, after deducting the costs of realisation, shall be rateably distributed among all such persons. Provided as follows :

- (a) Where any property is sold subject to a mortgage or charge, the mortgagee or incumbrancer shall not be entitled to share in any surplus arising from such sale ;
- (b) Where any property liable to be sold in execution of a decree is subject to mortgage or charge, the Court may, with the consent of the mortgagee or incumbrancer, order that the property be sold free from the mortgage or charge, giving to the mortgagee or incumbrancer the same interest in the proceeds of the sale as he had in the property sold ;
- (c) Where any immoveable property is sold in execution of a decree ordering its sale for the discharge of the incumbrance thereon, the proceeds of sale shall be applied—

first, in defraying the expenses of the sale ;

secondly, in discharging the amount due under the decree ;

thirdly, in discharging the interest and principal money due on subsequent incumbrances (if any) ; and

fourthly, rateably among the holders of decrees for the payment of money against the judgment-debtor who have

prior to the sale of property, applied to the Court which passed the decree, ordering such sale for execution of such decrees, and have not obtained satisfaction thereof.

(2) Where all or any of the assets liable to be rateably distributed under this section are paid to a person not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets.

(3) Nothing in this section affects any right of the Government. (S. 73.)

LEGAL CHANGES.—The present section differs from the corresponding section of the old Code in the following respects ; (i) The words " where assets are held by a Court " are substituted for the words " whenever assets are realised by sale or otherwise in execution of a decree. " (ii) The expression " before the receipt of such assets " is substituted for the words " prior to the realisation. " (iii) The words " decrees for the payment of money passed " are substituted for the words " decrees for money. "

OBJECT OF THE SECTION.—The object of the section is two-fold ; firstly, to prevent unnecessary multiplicity of execution proceedings ; to obviate in a case where there are many decree-holders, each competent to execute his decree by attachment and sale of a particular property, the necessity of each and every one separately attaching and separately selling that property ; secondly, to secure an equitable administration of the property by placing all the decree-holders in the same position of standing, the same footing, and making the property rateably divisible among them, instead of allowing one to exclude all the others, merely because he happened to be the first who had attached and sold the property. *Strachey, C.J.*, in 20 M. 107 ; 51 O. 761. This section relates to procedure only and is intended to afford additional facility to decree-holders besides his other remedy by suit. 10 O. 567.

SCOPE OF THE SECTION.—This section deals with the rateable distribution of the proceeds of execution sales among holders of various decrees. 14 O.W.N. 396. This section does not limit or alter the rights of parties arising out of a contract. But it applies only in cases where there is no rule for determining the mode in which the proceeds of sale are to be distributed. 4 O. 29. This section does not conclusively determine the rights of the parties. It enables a distribution of the proceeds of sale to be made according to what may seem at the time to be the right of parties. 23 A. 313 P.O. This section does not interfere with substantive rights available by means of a suit even if the decree-holder may not have availed himself of its facility. 10 O. 567. This section does not prevent a decree-holder from executing his decree in any other way, if he has failed to participate in the sale proceeds under it. 19 W.R. 255. It is necessary that more than two persons must have applied for execution. 30 I.O. 49 = 21 O.L.J. 624. The Court is not justified in making an order under this section before the realisation of assets, in anticipation of their being realised, 84 I.C. 747 = 28 O.W.N. 988.

DISTINCTION BETWEEN THE CODE OF 1859 AND 1882.—Under S. 270 of the Code of 1859 a creditor obtaining an attachment was entitled to be first paid out of the proceeds of the sale notwithstanding a subsequent attachment of the same property by any other person in execution of his own decree, but S. 295 of the Code of 1882 points to a rateable distribution of proceeds of sale under a decree in certain

events and under certain circumstances. 29 C. 428 ; 29 B. 405 ; 32 M. 429 ; 26 M. 673.

CONSTRUCTION.—The section should be strictly construed, as the effect of allowing a claim for rateable distribution upon the proceeds of a private sale in satisfaction of a judgment-debtor, will necessarily diminish *pro tanto* the amount available for the judgment-creditor through whose diligence the assets have been realised. 28 M. 380.

WHAT DECREE-HOLDERS ARE ENTITLED TO CLAIM RATEABLE DISTRIBUTION.—S. 73 gives the right to rateable distribution in the proceeds of sale only to those decree-holders who could themselves have attached and sold the property. It was not meant to enable a decree-holder to indirectly get the benefit of an execution which he could not himself have enforced directly. When the decree-holders are persons who could have themselves attached and sold the property, then, and only then may, the attachment and sale by one of them, be regarded as enuring for the benefit of all. 23 A. 106 ; 30 I.C. 49 = 21 O.L.J. 624 ; 21 I.C. 611 = 14 M.L.T. 533. Where a decree-holder against one of two brothers in a joint Hindu family obtained an attachment of joint Hindu family property in the life-time of the judgment-debtor, and other decree-holders against the same brother applied after the death of the judgment-debtor for rateable distribution, they were held not entitled to it as the property had then passed by survivorship to the other brother. 23 A. 106. Persons claiming to be creditors, but who have not obtained decrees, are not entitled to rateable distribution under this section. 64 I.C. 417.

Persons claiming under the same decree.—As between persons jointly interested in a decree those who first apply for execution are not entitled to any priority over other joint holders of the decree. 2 Agra 183.

Persons attaching before judgment.—A plaintiff who has attached before judgment is not entitled to come under this section unless he has applied for execution of the decree subsequently obtained. 12 B. 400 ; 34 M. 25 ; 29 I.C. 791 = 120 P.W.R. 1915.

Holders of decrees that have been satisfied, etc.—If on an application for execution of a decree it has been held that the decree has been satisfied or is barred by limitation or if such an application has been dismissed, no claim for rateable distribution lies. 30 I.C. 49 = 21 O.L.J. 624. A decree-holder whose application for execution is finally struck off, cannot claim rateable distribution. 5 I.C. 145 ; 24 I.C. 83.

THE FOLLOWING CONDITIONS ARE NECESSARY TO ENABLE A DECREE-HOLDER TO CLAIM RATEABLE DISTRIBUTION.—1. The decree-holder shall make an application for execution to the Court. 2. The Court to which the application for execution is to be made is the Court by which assets are held. 3. The application should be made prior to the receipt of the assets by the Court. 4. The assets liable to rateable distribution are the assets held by the Court. The decrees in respect of which a rateable distribution is claimed must be decrees for the payment of money. 6. The decrees in respect of which rateable distribution is claimed must be against the same judgment-debtor. 7. The rights of the mortgagees or encumbrances of the property sold have priority and are satisfied before rateable distribution. 8. The rights of the Government have a preference over any other claims. See 14 C.W.N. 396 ; 15 C.W.N. 872 ; 25 M.L.J. 601 ; 46 M. 506 ; 91 I.C. 93.

THE DECREE-HOLDER SHALL MAKE AN APPLICATION FOR EXECUTION OF THE DECREE.—There must be an application for execution in order to entitle a decree-holder to a rateable distribution. 98 P.R. 1889 ; 35 M. 588 ; 21 I.C. 869 = 25 M.L.J. 601 ; 7 I.C. 553 ; 9 C. 920 ; 5 B. 198 ; 18 B. 456.

S. 78 gives the right to rateable distribution only to decree-holders who have applied for execution and not to decree-holders who have merely got attachment before judgment. 34 M. 25 ; 37 A. 575 ; 91 I.C. 93. An order for rateable distribution cannot be made in favour of a person who has not obtained his decree, but only an order for attachment before judgment and who is thus incompetent to apply for execution at the time when assets were realised. 21 C.L.J. 614 = 30 I.C. 38 ; 19 M. 72 ; 32 I.C. 944 ; 12 B. 400 ; 4 M.L.T. 348 ; 14 M.L.T. 533 ; 10 C.W.N. 634.

An attachment of the property is not necessary for a claim to distribution. 7 C. 34.

The application for execution should be made in the form prescribed by O. 12, r. 11. 5 B. 198 ; 64 I.C. 53 ; 93 P.R. 1889 ; 8 M.L.T. 226 ; 87 I.C. 1025 ; 90 I.C. 527. An application for execution to the Court by which assets are held is essential before the receipt of assets. 8 I.C. 852 ; 25 M.L.J. 601 ; 36 B. 519 ; 15 C.W.N. 872 = 10 I.C. 527 ; 3 I.C. 105 = 13 C.W.N. 396.

The application must be subsisting.—When the application for execution is struck off the file prior to the receipt of the assets, the applicant cannot share. 4 M. 383 ; 5 I.C. 145 ; 13 Bom. L.R. 977 ; 5 I.C. 820 ; 37 C. 92. Dismissal for non-prosecution of a decree-holder's application for execution does not affect his right to share in a rateable distribution under S. 78, and he is therefore entitled to make an application under O. 21, r. 90, to set aside a sale on the ground of fraud, etc. 18 C.W.N. 1211 = 24 I.C. 83. When a decree-holder had applied for execution of the decree which he had attached (which was in favour of the judgment-debtor) only to the extent of the amount due to him under his own decree, he was in effect executing his own decree and was entitled to rateable distribution. 21 I.C. 611 = 14 M.L.T. 533.

An application for rateable distribution is not an application for execution. There must be an application in the form prescribed by O. 21, r. 11 (2). 14 C.W.N. 396 ; 64 I.C. 53 = 17 N.L.R. 143 ; 8 M.L.T. 226. An application which is in accordance with the provisions of O. 21, r. 11 (2) is nonetheless an application for execution because the assistance asked for from the Court is the benefit of rateable distribution and a separate application is not necessary. 23 Mys. C.O.R. 170 ; 3 Mys. C.O.R. 82. A judgment-creditor obtaining only warrants of attachment is not entitled to rateable distribution. 13 C. 225. An application to the Court which realised the assets for an order to another Court not to sell the properties cannot be deemed to be an application for execution of the decree. 3 I.C. 105 = 13 C.W.N. 396. This section does not apply when the application is by Judge's Amin for payment out of Court. 38 M. 221. A Court to which a decree is sent for execution may not be competent to execute it before a copy of the decree is received but when once an order is made sending a decree to another Court for execution that by itself is sufficient to entitle the decree-holder to apply to the Court to which the decree is sent for execution for rateable distribution in the assets. (1911) 2 M.W.N. 47 = 8 I.C. 852. It is not necessary that an application for rateable distribution should be made in the course of execution proceedings initiated by some other decree-holder. Such an application may be made in the course of execution proceedings taken by the applicant himself. Moreover it is not necessary that a notice of such an application having been made must be given to the other decree-holders. 27 A. 132. A mere attachment of property is not sufficient to entitle the decree-holder to rateable distribution. 90 I.C. 527. Hence a mere attachment under S. 46, C.P. Code, by means of a precept is not sufficient to entitle a decree-holder to rateable distribution. 1926 C. 249.

THE COURT TO WHICH THE APPLICATION FOR EXECUTION IS TO BE MADE IS THE COURT BY WHICH ASSETS ARE HELD—When the decrees are of two Courts those who wish to share in the assets should have their applications

transferred to the Court holding the assets, otherwise they cannot get any share. 6 M. 357 ; 7 O. 553 ; 16 B. 683 ; 4 B. 472 ; 5 B. 198 ; 21 I.C. 869—35 M.L.J. 601 ; 38 M. 221 ; 14 O.W.N. 396 ; 33 O.L.J. 7. An application for execution to the Court by which assets are held is essential. 8 I.C. 852 ; 25 M.L.J. 601 ; 36 B. 519 ; 15 O.W.N. 872 ; 10 I.C. 527 ; 3 I.C. 105—13 O.W.N. 396 ; 33 O.L.J. 7—62 I.C. 167. A decree-holder is not entitled to share in the rateable distribution of assets unless he has previously caused the decree to be transferred for execution to the Court where the process of realisation takes place. 16 B. 683 ; 18 B. 456 ; 7 Bur. L.T. 277 ; 13 O.C. 291 ; 19 B. 539 ; 7 O. 553 ; 4 B. 472 ; 5 B. 198 ; 6 M. 359 ; 28 B. 383 ; 1926 S. 177. When two Courts are centred in one official, *e.g.*, a Subordinate Judge invested with Small Cause Court powers a transfer must be made from one side to the other of the Court. 3 A. 710 ; 21 I.C. 869—25 M.L.J. 601 ; 8 B. 230 ; but see 9 B. 174 ; 9 B. 237 ; 19 B. 436 ; 18 B. 61. The Calcutta and Madras High Courts hold that it is not necessary to have a decree transferred from the inferior to the superior Court. Only an application for execution must be made to the superior Court. 25 M. 588 ; 26 M.L.J. 406—23 I.C. 909 ; (1921) M.W.N. 507 ; 21 C. 200 ; 2 C.W.N. 126 ; 12 O. 333 ; see also 29 I.C. 21—8 Bur. L.T. 201 ; 46 C. 64 ; 8 I.C. 372—13 O.C. 291. If a transfer has been made directly from one Court to the other but not through proper channels prescribed, a rateable distribution may be allowed. 15 M. 345. The Law contemplates that one Court and one only shall have the power of deciding objections to the attachment, of determining claims made to the property, of ordering the sale thereof, of securing the proceeds, and of providing distribution thereof under S. 73. 4 A. 359. Where a decree is transferred from the Court which passed it to another Court for execution and subsequent to the transfer, another decree-holder by executing his decree in the former Court brings the property of the judgment-debtor to sale, there is nothing in S. 73 which might require the former decree-holder to get his decree re-transferred to the Court which passed it to entitle him to apply for rateable distribution. 1 O.L.J. 315. An application under S. 73 does not become invalid on the ground that two execution proceedings with respect to the same decree were pending in two different Courts at the same time. 1 O.L.J. 315.

Sale held by an Inferior Court.—When the same property has been attached the execution of two decrees, one passed by a Court of the superior grade, and the other by a Court of the inferior grade, the sale should be held by the Court of superior grade. But when the sale has been held by the Court of the inferior grade the former is not to direct the latter (inferior Court) to transmit the proceeds to his Court, but should move the District Judge to have the proceeds so transferred ; and the sale proceeds are then rateably distributed in accordance with the provisions of S. 73, O.P. Code. 46 C. 64 ; 4 A. 359 ; 49 B. 655 ; 12 O. 333 ; 18 B. 458 ; 25 C. 46 ; 8 M.L.J. 35. A District Judge has no jurisdiction over sales ordered by a Sub-Judge. 1 O.L.J. 534. Rival decree-holders who have attached the property of their judgment-debtor in execution in several Courts, before the receipt of assets by the Court of the highest grade are entitled to share in the rateable distribution on application to such Court though their decrees have not been transferred to the Court. 29 I.C. 21—8 Bur. L.T. 201. When the attachment has been directed by the Sub-Court in execution of its decree, the Munsiff has no jurisdiction to distribute the money amongst decree-holders in his own Court. He ought at once to send up the record to the Court of the Sub-Judge for the purpose of rateable distribution under S. 73. 8 I.C. 1176 ; 29 O. 773. Where the lower Court distributes the sale proceeds without giving any share to the decree-holder of the Higher Court he may institute a suit for refund (*ibid*). A decree-holder who has not applied for execution before the receipt of assets in Court is not entitled to rateable distribution. 11 P.L. R. 1920 ; 54 I.C. 41 ; 22 Bom. L.R. 1001—58 I.C. 992. S. 63 does not appear to give any preference to the decree-holder whose petition for execution is before the highest Court over other decree-holders who have also attached the property. All are entitled to share

rateably. 26 M.L.J. 406—23 I.C. 907. When property attached by a superior Court in execution of a decree is sold in execution of another decree by a Court of inferior grade, the only Court competent to determine any claim to rateable distribution is the Court of superior grade. 29 O. 773; 8 I.C. 1176—U.B.R. 1910 3rd Qr. 53.

Decrees of Courts of Small Causes and other Courts.—A decree passed by a Munsif in the exercise of his ordinary jurisdiction may be executed by a subordinate Judge executing a decree passed in his capacity of a Small Cause Judge and the holder of the decree of the Munsiff's court is entitled to rateable distribution, in execution of the small cause decree of the Sub-Judge. 15 M. 345.

Collector.—When a decree has been sent to the Collector for execution under S. 68, the Collector must hold any money realised by him in such execution at the disposal of the civil court by which the decree has been sent to him for execution; such a Collector is not competent to distribute such moneys under S. 73. 16 A. 1; 36 B. 519. The proper procedure for the holder of a decree of another court is to apply through that court to the court whose decree is being executed by the Collector for rateable distribution. 36 B. 519; 58 I.C. 992—22 Bom. L.R. 1001.

Revenue Court.—The holder of a decree of a Revenue Court cannot apply to a civil court for the execution of his decree or for rateable distribution. 22 A. 182.

Duty of the Superior Court under S. 63.—The superior court should consider and determine the rights of the attaching creditors in all cases whether they have applied to the superior court or not. It is not necessary that the attaching creditors must have obtained a transfer of their decrees to the superior court and applied for execution. Such decree-holders are entitled to rateable distribution under S. 63 read with S. 73 without any further application.

THE APPLICATION SHOULD BE MADE PRIOR TO THE RECEIPT OF THE ASSETS BY THE COURT.—44 O. 1072; 15 O.W.N. 872; 18 O. 242; 26 M. 179; 34 M. 25; 35 M. 588; 18 O.W.N. 1311; 21 O.L.J. 614; 80 I.C. 40; 1926 M. 179—91 I.C. 11; 22 Bom. L.R. 1001; 64 I.C. 53; 80 I.C. 40; 87 I.C. 390. A decree-holder who has not applied for execution before the receipt of assets in Court is not entitled to rateable distribution. 11 P.L.R. 1920—54 I.C. 41; 23 Bom. L.R. 1001—58 I.C. 992; 44 O. 1072; 15 O.W.N. 872—10 I.C. 527; 14 O.W.N. 396; 18 O. 242; 26 M. 179; 34 M. 25; 35 M. 588; 18 O.W.N. 1311; 21 O.L.J. 614; 64 I.C. 53; 80 I.C. 40; 33 P.R. 1918; 44 M. 100; 21 I.C. 869—25 M.L.J. 601.

Where a property is sold in execution of a decree in separate parcels, the sale proceeds are not deemed to be received until the entire amount of the purchase money in respect of all the parcels is paid into court. 26 M. 179; 34 M. 25; 44 O. 789; 47 O. 515; 33 P.R. 1918; 62 I.C. 167—33 O.L.J. 7; 18 O. 242; 19 M. 72; 14 O.L.J. 50; 18 O. 242. But when the property sold is moveable property and separate lots are sold on different dates the assets in case of each lot are received on the date of sale of each lot separately. 33 P.R. 1918. The receipt of assets means payment into court. 17 M. 72. The point for consideration is the date of the sale of the property. 44 O. 1072.

Assets are received in the case of sales of immoveable property within the meaning of S. 73 only on the date of full payment of the purchase money and not on the date of the preliminary deposit and the purchase money becomes the assets of the judgment-debtor only then and not on mere preliminary deposit. 21 M.L.J. 505—8 I.C. 852; 10 I.C. 527; 9 O.L.J. 210; 33 O.L.J. 7—62 I.C. 167; 18 O. 242; 35 M. 588. An application for rateable distribution is maintainable when the sale is going on as it is made before the receipt of assets. (1921) Pat. 204.

The receipt of purchase money by an agent appointed under O. 21, r. 65 to conduct a sale is equivalent to receipt by the Court within the meaning of S. 73. 44 C. 789.

Sale proceeds of moveables, belonging to the judgment-debtor realised by the Civil Nazir are assets received by the Court when the assets are realised by the Civil Nazir. 33 P.R. 1918.

A fund in Court belonging to the judgment-debtor was attached by a creditor and an application was made for payment out of the money to him. The Court refused to order payment in order to enable rateable distribution to be effected among the creditors of the judgment-debtor, whose claims had not yet matured into decrees of Court held that the order was illegal and may be set aside. 42 M. 692 ; 91 I.O. 93. A certain property was attached and sold before judgment and the proceeds of sale deposited in Court to the credit of the suit on 11-4-1917, and the decree was obtained on 2-7-1917. Another decree-holder got his decree on 19-4-1917 and applied to the Court having first attached the money in deposit. R got a decree and applied for payment to be made on 29-6-1917. All were held entitled rateable distribution. 46 M. 506. A decree-holder applying to the Court after the sale of the property, that he has applied to the District Court for execution and so the set-off to the decree-holder auction-purchaser be not allowed has no right to rateable distribution. 62 I.O. 857 (O.)

Where a decree-holder is himself the auction-purchaser and claims set off against the price of the property purchased which is allowed by the Court no application for rateable distribution can be entertained after the termination of the sale, and the order allowing set-off under r. 72 is not equivalent to receipt of assets, but a mere disposing thereof. 80 I.O. 40.

A decree-holder is not entitled to rateable distribution when the decree in his favour was passed after the assets, were paid to other decree-holder although he had attached the property of the judgment-debtor before judgment. 40 P.L.R. 1922.

Where the payment into Court of assets realised and the application for rateable distribution are made on the same day there is no presumption as to the order of events, and the officer distributing the assets should ascertain which act was prior of time. (1918) M.W.N. 520=47 I.O. 296. A Court to which a decree is sent for execution may not be competent to execute it before the receipt of the copy of the decree but order of transfer entitles the decree-holder to apply for rateable distribution. 8 I.O. 852.

A decree-holder who applies for rateable distribution subsequent to the payment of the purchase money by the auction-purchaser but before confirmation of sale is not entitled to rateable distribution. 6 B. 16 ; 12 B. 252.

A judgment-creditor attaching subsequent to realisation of rents by the receiver is not entitled to rateable distribution. 26 C. 772.

A decree-holder applying for rateable distribution before the receipt of assets by the Court is entitled to such distribution in respect of the whole sum. 18 C. 242 ; 19 M. 72. A decree-holder who attaches the surplus sale proceeds subsequent to the realisation of the assets is not entitled to have any share in the assets. 9 C.L.J. 210 ; 26 C. 72.

Sale held by a Collector.—When an execution sale is held by the Collector, an application for rateable distribution must be made before that officer receives the sale proceeds. 22 Bom. L.R. 1001=58 I.O. 992.

Amendment of application.—When an application for execution is ordered to be amended by adding the complete list of the property, another decree-holder has no preferential right by applying later, though before the completion of the necessary

amendment. (1917) M.W.N. 859. When moneys have been allowed to several decree-holders under this section and stand to their credit, they (moneys) are no longer the property of the judgment-debtor, and they are the property of the various decree-holders, even though they are not paid out. 68 I.O. 512=42 M.L.J. 361.

THE ASSETS LIABLE TO RATEABLE DISTRIBUTION ARE THE ASSETS HELD BY THE COURT.—The omission of the words "realised by sale or otherwise in execution" and the substitution of "assets held by the Court" in the present Code, must have been deliberate and the intention of the Legislature was that the term assets should now include any assets held by the Court irrespective of the manner in which they came into possession of the Court. The scope of the section has been deliberately enlarged. 35 C.L.J. 327. The natural interpretation of the wide language would involve any assets in the possession of the Court and at the disposal of the Court for the purpose of satisfying a decree against a judgment-debtor. There is no reason why it should be restricted to what is paid in by virtue of a process taken in execution. 26 C.W.N. 169=1922 O. 19=70 I.O. 539; 65 I.O. 230. See also 41 M. 616. Where a decree-holder applied for execution and money was deposited by the judgment-debtor with the sheriff who paid it into Court, the money so deposited was assets available for rateable distribution. 47 C. 515. Money voluntarily brought into Court is an asset. 35 C.L.J. 327. But under the old law the assets realised in execution alone were subject to rateable distribution. 13 C. 225; 21 C. 809; 28 M. 380; 8 A. 67; 97 B. 138; 13 I.O. 907=15 C.L.J. 49. A similar view is still taken under the present Code in the following cases. S. 73 applies to a case where money is realised in execution by process of the court and not when it is deposited in Court by judgment-debtor for payment to a particular decree-holder. 81 I.O. 7. Assets means assets realised in execution. 38 M. 221; 36 B. 156; 53 I.O. 599=21 Bom.L.R. 975. But see 93 I.O. 852 (B.) *infra*. Assets held by the Court mean assets levied in execution or paid into Court in satisfaction of the decree under execution. 14 L. W. 582; (1921) M. W. N. 817. In execution of a decree by a warrant of attachment of the moveable property of the judgment-debtor, the bailiff entered the judgment-debtor's shop and showed the warrant to a partner in the judgment-debtor's firm and pointed out that if money were not paid he would seize and keep in his custody the moveable property in the shop. The judgment-debtor paid the decretal money immediately; *held* that the amount was not assets held by the Court. 21 Bom. L.R. 975=53 I.O. 599. When money is paid into Court but not in execution of a decree the proceeds of execution are not liable to rateable distribution. 11 P.L.R. 1920=54 I.O. 41. There should be realisation of the assets in execution. 33 C. 639=7 A. 702. Money paid into Court by the judgment-debtor without any process being issued on the execution application is money realised by the execution of the decree within the meaning of r. 10 (b) of the Rule of Practice (Madras), though it may not come within the provisions of the C. P. Code. (1914) M.W.N. 309=23 I.O. 241. This section has no application when an application is made for payment out of a fund standing to the credit of a suit. 38 M. 221. Money paid into Court, without any process having been issued on the execution application is not assets. 23 I.O. 241=(1914) M.W.N. 309; 81 I.O. 7=1925 N. 157.

Money paid into Court under O. 21, r. 55 is not assets held by the Court. 8 A. 67; 28 M. 380; 81 P.R. 1908=36 B. 156; 13 Bom. L.R. 1193. (*contra* held in recent Calcutta case (47 C. 515); 21 Bom. L.R. 975=53 I.O. 599; 17 I.O. 625=14 Bom. L.R. 904. Money paid into Court while an application for the attachment of that money is pending is assets. 11 M.L.T. 38.

Money paid out of Court by the judgment-debtor to a judgment-creditor is not money realised in execution and held by the Court. 15 C.L.J. 49=13 I.O. 907;

28 M. 380. When moneys are realised on a personal decree and in execution they are assets, held by the Court. (1912) M.W.N. 407 = 15 I.C. 406.

The effect of immoveable property being given as security is something more than attachment and the property given as security is applicable solely in discharge of the judgment-debt and is not liable to be rateably distributed, though the mode of realisation by the Court of such security in execution is of the same nature as a sale by the Court of immoveable property attached. 41 M. 327.

Money paid by a judgment-debtor to the officer arresting him in order to secure his release is not assets held by a Court so that they may be liable to rateable distribution under S. 73. 16 Bom. L.R. 274 = 39 I.C. 623 ; 6 B. 588.

Money paid into Court in pursuance of a prohibitory order of Court is not assets within S. 73 until an order has been made directing payment to creditors. 167 P.W. R. 1917 = 42 I.C. 436.

Money paid into Court in satisfaction of one of the decrees.—A judgment-debtor's property was attached in execution of a certain decree, and another decree-holder applied for attachment of the same property in execution of his decree against the same judgment-debtor. The judgment-debtor paid into Court the amount due to the first decree-holder a day prior to the sale and sold it privately to another person; held that the second decree-holder was entitled under S. 73 to a rateable distribution of the assets received by the Court and the private distribution of the property was void as against his claim. 8 Bur. L.T. 14 = 26 I.C. 264 ; 8 A. 67. Money obtained as a result of a private arrangement is not assets. 54 I.C. 41 = 11 P.L.R. 1920. Money paid by a judgment-debtor under a warrant of attachment under O. 21, r. 43 is assets, 1926 B. 242 = 93 I.C. 852 (36 B. 156 dissented from).

Money paid into Court under O. 21, r. 89, O. P. Code, for payment to the decree-holder is money paid in for a specific purpose and is not assets realised in execution available for rateable distribution. 42 I.C. 507 ; 31 B. 287 ; 40 C. 619 ; 30 C. 262 ; 1 O.W.N. 695 ; 37 B. 387 ; 17 I.C. 920 = 23 M.L.J. 585 ; 45 I.C. 782 ; 7 L.W. 573.

Money paid into Court to the credit of the judgment-debtor before any decree-holder applies to have it paid in satisfaction of his decree is liable to rateable distribution among decree-holders who apply for execution either before or after such money is paid into Court. 44 M. 100 F.B. No one of the creditors is entitled to preferential treatment by reason of the priority of his attachment. 44 C. 1072 ; 33 C.L.J. 17 = 62 I.C. 167 (contra in 24 I.C. 617 = 23 M.L.J. 364).

Payment into Court by a judgment-debtor to avoid arrest is payment for a specific purpose, the satisfaction of the plaintiffs' decree, and is therefore not attachable by other judgment-creditors. 61 I.C. 424 = 14 S.L.R. 164.

Money remaining in the hands of the decree-holder purchaser with the permission of the Court, to be set off against the amount of the decree is assets held by the Court when another decree-holder applies for rateable distribution before the sale in favour of the decree-holder as it is open to the Court to direct him to pay that sum into Court and it is therefore in the power and at the disposal of the Court and is held by it within the meaning of S. 73. A refund of this amount might be enforced by process in execution. 43 I.C. 715 ; 12 L.W. 328 = 59 I.C. 86 ; 6 B. 570 ; 5 M. 123.

Fund in the custody of a Court becomes the assets held by the executing Court as soon as it is transferred to the latter Court. When the executing Court and the custody Court are the same the fund becomes the assets held by the Court within the

meaning of S. 73 by an order of attachment coupled with a formal order of transfer of the fund to the credit of the suit in which execution is sought. 44 M. 100 F.B.

Money in the custody of a public officer attached under O. 21, r. 52 and paid into Court by that officer is assets. 28 B. 264. Where holders of decrees of several Courts apply for satisfaction of their decrees out of a fund in the custody of a Court, the proper rule governing their titles is O. 21, r. 52. They are entitled to share only rateably as in the case of administration of the estate of a deceased person or of an insolvent, as attachment does not give any priority to the first attaching creditor but only prevents alienation. The shares due to holders of decrees of other Courts than the one which has custody of the fund are to be distributed only according to the orders of those Courts. 38 M. 221. "Assets" means all the property, of whatever kind which may be used to satisfy the judgment-debts. 16 I.O. 640=14 Bom. L.R. 683.

When certain money was deposited in Court under O. 38, r. 2 on the arrest of the defendant before judgment, a lien is created on it in favour of the plaintiffs from the time it was deposited and any other creditor cannot claim rateable distribution of the same as it was merely paid for a specific purpose. 8 Bur. L.T. 22=29 I.C. 714 (36 B. 153 followed).

When money is paid into Court in one of the methods mentioned in O. 21, r. 88 or r. 69 such money should be regarded as assets held by the Court. 41 M. 616 (36 B. 156 dissented from); 6 B. 588; 8 A. 67; 28 M. 380. Funds paid into Court under a consent order and remaining in the hands of the Courts' officers are assets. 16 B. 91.

Money deposited in a bank in the joint names of the Collector and judgment-debtor, and which was subsequently put at the disposal of the Court is assets. 28 B. 264.

Money realised in execution out of the unsecured property of the mortgagor is assets and the mortgagees have no prior right therein. 20 M. 107.

The salary of a Government Officer that is attached by one creditor and then subsequently by another forms assets under this section held by the Court. 14 Bom. L.R. 683=16 I.O. 640.

The money paid into Court by the judgment-debtor on application for execution, though not strictly within this section is 'assets' being realised within the meaning of r. 279 (6) of Civil Rules of Practice, Madras. (1914) M.W.N. 309.

Proceeds of property sold by trustees under an agreement sanctioned by Court to the effect that the creditor should have the same lien on the balance after defraying certain trust expenses as he had on the property itself, are not assets. 21 O. 809.

The salary of the judgment-debtor which had accrued due prior to the insolvency, must under S. 73, be treated as realised assets of the judgment-debtor. 27 O. 351.

Money attached and retained under a temporary injunction under O. 39, r. 1, is liable to rateable distribution in execution of decree against the same defendant. 7 Bur. L.T. 277=26 I.O. 941.

When there are several attachments before judgment and moneys are realised before any of the decrees are obtained in the suits the moneys should be held to the credit of all the suits, and distributed between all the attaching creditors who subsequently obtained decrees. 68 I.O. 717=(1922) M.W.N. 262.

Rents of property under attachment which have been realised by a receiver appointed by the Court are assets. 26 O. 772.

Money paid by a private purchaser of property in satisfaction of the decree is not assets. 28 M. 380.

Money paid as the market value of the property belonging to the debtor by a person who held it for him, is assets. 6 Bom. L.R. 379.

Debts attached under O. 21, r. 46, and paid into Court by the garnishee are assets. 16 B. 91 ; 5 M.L.J. 151.

Money realised in execution of a decree held by the judgment-debtor against another where such decree is attached and realised under O. 21, r. 53, is assets. 31 M. 502 ; 6 M. 418.

The deposit of 25 per cent of purchase money made under O. 21, r. 86, is not assets immediately because it is liable to forfeiture in the event of non-payment of the balance. 18 C. 242. The remaining three-fourths being paid into Court are assets. (*Ibid*) ; 10 M. 57.

Money voluntarily paid by Official Assignee on behalf of the judgment-debtor or by the judgment-debtor himself, for the purpose of releasing the property from attachment is not assets. 13 C. 225 ; 8 A. 67 ; 6 B. 588.

The sale proceeds become assets as soon as they are fully paid into Court. It is not necessary that the sale should be confirmed. 6 B. 16.

Sale proceeds of property attached before judgment and sold on account of its perishable nature are not assets. 10 C.W.N. 634.

Money paid into Court by the heirs of a Jagirdar for his own personal decree is not assets for a decree against the Jagirdar and is not liable to rateable distribution at the instance of such creditor. 55 P.L.R. 1913.

Money realised by a Receiver appointed by court in execution are such assets, 26 C. 772 ; A.W.N. (1890) 194.

A fund which at the time of the prohibitory order was a chose in action and which subsequently came in a form available for immediate application towards satisfaction of the decree is assets. 16 B. 91.

Money paid by a judgment-debtor into Court under an order of attachment which was *ultra vires* cannot be treated as assets. Such a payment being a voluntary one made in order to avoid execution or from a desire to pay a debt due is not assets realised in execution. 6 P.R. 1903 ; 21 Bom. L.R. 975.

Money deposited by the judgment-debtor and accepted by the Court as security for the due performance of such decree as might ultimately be binding upon him is not assets ; and another creditor of the judgment-debtor, by attaching the money before the date of the final decree in favour of the first creditor does not prejudicially affect the latter's rights. 36 P.L.R. 1916=29 I.C. 791.

It is necessary for the applicant for rateable distribution of the sale proceeds to obtain leave from the Court by which the Receiver was appointed, before he can be permitted to prosecute his application against him under S. 73, C.P. Code. 15 C.W.N. 725=11 I.C. 187.

Money paid into Court as security under O. 41, r. 5, is not assets. 36 P.L.R. 1916=29 I.C. 791. Property given as security under O. 41, r. 5, is not assets. 41 M. 327. Compensation money awarded under Land Acquisition Act is assets under this section either from the date of receipt or at least from the date of the final award. 1926 M. 307=49 M. 38 ; 41 M. 616 ; 1922 C. 19.

THE DECREE IN RESPECT OF WHICH A RATEABLE DISTRIBUTION IS CLAIMED MUST BE DECREES FOR THE PAYMENT OF MONEY.—1926 M. 179=91 I.O. 11.

Decrees for rents and profits.—A decree declaring that the plaintiff is entitled to have a former decree of his satisfied out of the rents and profits of certain property is decree for money. A.W.N. (1890) 194.

A decree for mesne profits is a decree for money, even though the amount may remain uncertain until determination. 5 M. 123.

A judgment under S. 86 of the Insolvency Act is a money-decree. 5 B. 511.

A decree which directs the realisation of the decretal amount from the hypothecated property and in case of its insufficiency makes the defendant remain personally responsible, is a money-decree. 27 O. 285 ; 39 M. 570 ; 30 O. 583 ; *contra* in 25 O. 580 ; 17 C.W.N. 1039=20 I.O. 829 ; 26 O. 166.

A decree directing defendant to pay money within a certain time and on default, the property mortgaged is to be sold and the balance is to be realised from the other properties of the defendant is a decree for payment of monies. 28 M. 224 ; 28 M. 473 F.B. (*contra* in 16 A. 18 ; 22 A. 401).

Every decree by virtue whereof money is payable is to that extent a decree for money, 28 M. 473 F.B. ; 11 O. 718 ; 28 M. 224.

A decree directing the realisation of money by the sale of mortgaged property is not a money decree. 25 O. 580 ; 27 O. 285 ; 26 O. 166.

Where a decree expressly exempts the mortgagor from personal liability and is limited to the mortgaged property, it is not a money decree. 17 I.O. 941=23 M.L. J. 699.

A decree passed under O. 34 r. 6 for the balance of money remaining due after payment to the mortgagee of net proceeds of the sale of the mortgaged property is a decree for the payment of money. 25 M. 244.

A decree which directs the sale of the property mortgaged of A and B and merely directs payment of money from C is a money decree against C. 10 A. 35.

A simple money decree for interest due on a mortgage is a money decree. 52 I.O. 645=22 O.O. 150 (23 A. 103 not followed). A decree for sale, containing also a direction for the realisation of the balances of the mortgage-debt after the sale of the mortgaged property, out of any other property of the judgment-debtor is a mortgage decree and not a money decree. 16 A. 418 ; 22 A. 401 (*contra* in 25 M. 244). A decree passed under S. 88 or 90 of the T.P. Act is not a money decree. 27 O. 285 ; 16 A. 418 ; 25 O. 580 ; 20 M. 107 ; 25 A. 541. (But *contra* held in '31 C. 792 that it is a money decree in so far as it allows the sale of other property of the judgment-debtor in the event of the mortgaged property failing to satisfy the decree). A decree for the payment of money does not include a decree for sale in enforcement of a mortgage or charge. (See Report of the Select Committee). Whether or not any special means are provided for the realisation of the money in a money decree, it is still a money decree. 121 P.L.R. 1908. A judgment entered under S. 86 of the Insolvent Debtor's Act is a money decree. 8 B. 511.

THE DECREES IN RESPECT OF WHICH RATEABLE DISTRIBUTION IS CLAIMED MUST BE AGAINST THE SAME JUDGMENT-DEBTOR.—42 O. 1 ; 47 I.O. 296 ; 25 B. 494.

The test is not whether the decrees have been passed against the same judgment-debtor, but that the applications are against the same judgment-debtor. 8 O.O. 36 ; 10 O.O. 129 (See also 42 O. 1 ; 4 Pat. L.T. 373=(1929) Pat. 215.)

A decree against a person and another against his legal representative are not decrees against the same judgment-debtor. 25 B. 494; 33 M. 465; 52 I.C. 305=22 O. C. 194; 26 A. 28; 16 B. 683; 27 A. 158 (*contra* in 11 O. 718).

Where there are two decrees against A, one against him, personally and the other against him as the legal representative of B, A does not fill the same character and both the decree-holders cannot have rateable distribution when A's properties are sold in execution. 7 Bur. L.T. 67=24 I.C. 476; 18 I.C. 55=55 P.L.R. 1913.

When there are several judgment-debtors and some of them are common to the two decrees, rateable distribution can be made only according as the interests of those in both the decrees are concerned. 7 Bur. L.T. 67=24 I.C. 474; 47 I.C. 296=(1918) M.W.N. 520; 9 C. 920; 16 B. 683; 29 B. 528; 30 O. 583 F.B.; 27 A. 158; 26 M. 179; 10 I.C. 527=14 C.L.J. 50; 1926 B. 150=50 B. 111.

But if the property realised was the joint property of a common judgment-debtor and another judgment-debtor the decree-holder holding a decree against the former alone is not entitled to share his decree not being against the same persons. 18 B. 683; 12 C. 294, overruled; 30 C. 583; 20 O. 673 but see 3 C.W.N. 36.

When one decree is against a father (a Zamindar) and his son and after the death of the father, no special application and order is made under S. 50 of the Code and no attempt is made to realise the property, as the assets of the deceased Zamindar and another decree was against the son, both were entitled to share rateably. 22 M. 241.

Where A and B held money decrees against certain judgment-debtors and the judgment-debtors of A represented only the $\frac{2}{3}$ of the property sold, A was held entitled to rateable distribution out of the $\frac{2}{3}$ which was the share of his judgment-debtor. 16 A.L.J. 530=46 I.C. 101. See also 30 C. 583; 23 A. 106.

When there are two decrees for money against a person, one being against him personally and the other against him as the legal representative of his father to the extent of the assets of his father in his hands, and attachments were taken out in both the decrees and the property of the judgment-debtor was sold in execution, the sale proceeds are liable to rateable distribution between the two decree-holders. 33 M. 75; (1917) M.W.N. 859=42 I.C. 897.

When one decree is against the father and the other against the father and son, members of the joint family, the judgment-debtors are the same for the purposes of S. 73, where the property, from which the assets are realised, is the ancestral property of the family of which the father and son are undivided members. 26 M. 179.

One decree against the sons of A and to be satisfied out of the assets of the family in their hands and another against A himself are not decrees against the same judgment-debtor. 5 I.C. 917=7 M.L.T. 157.

It is not essential that all the judgment-debtors should be identical and the fact that in one decree there is an extra judgment-debtor does not make the section inapplicable. 74 I.C. 626=4 Pat. L.T. 373; 9 C. 920; 22 M. 241; 29 B. 528; 10 A. 35. A decree against A and another against B, C and D are not decrees against the same judgment-debtors. 1 P.R. 1866.

Decrees against the estate of the deceased testator represented by two out of three executors.—Two decrees were obtained against the estate of the deceased testator, each obtained against two out of the three executors. One of these two executors was common to the two suits. Each decree was *prima facie* capable of execution against the same estate, and the decree-holders were entitled to rateable distribution of the assets under S. 73. 27 C.L.J. 100=43 I.C. 452.

Decree for dower.—A decree for dower against the estate of the deceased husband constitutes a general charge on the estate so that it will have priority over any judgment obtained against the heir for his own debt. Such decrees are not against the same judgment-debtors. The widow is entitled to a declaratory decree that a private creditor against the heir can bring the estate of the deceased to sale only subject to the decree for dower. 26 A. 28.

THE RIGHTS OF THE MORTGAGEES OR INCUMBRANCERS OF PROPERTY SOLD IN EXECUTION HAVE A PRIORITY AND ARE SATISFIED BEFORE RATEABLE DISTRIBUTION OF ASSETS. (Proviso to S. 73).

APPLICABILITY.—Under S. 73 of the Code the claim of a co-operative society cannot be enforced unless they have a decree or charge under S. 20 of the Co-operative Societies Act, though under S. 19 of that Act, the society might have raised an objection to the attachment by reason of the other sections of the C.P. Code. 42 O. 377. Since the widow has a general charge over the estate of her deceased husband, no question of rateable distribution under S. 73 can arise between the widow for her dower-debt decreed to her and the judgment-creditors of her husband's heirs. 26 A. 28. (See also 1893 P.J. 306.) A landlord decree-holder for arrears of rent against his tenant has a priority over the ordinary decree-holders of the tenant with respect to the proceeds of sale realised in execution by sale of the buildings and materials. 4 B. 429. The rights of several mortgagees are satisfied in the order of the priority of their mortgages. 25 W.R. 187; 17 M.L.J. 332; 7 A. 378; 17 M.L.J. 80; 9 M. 57. Where an agriculturist's house and site are sold in execution of a decree for rent due in respect of it, an ordinary money creditor of the debtor cannot have a rateable distribution. 4 B. 429. The rights of the decree-holders whose rights are secured by contract (e.g. mortgages, etc.) are not affected by S. 73. 8 O.C. 86; 8 W.R. 501. A decree ordering a certain property to be sold in satisfaction of a certain sum gives in equity and law a right of sale preferential to that of the holder of a later decree notwithstanding such later decree-holder may have first attached the property in execution. 4 N.W.P. 5. In the absence of any express consent on their part it cannot be held that the mortgagees have given up their mortgage security and that their rights as mortgagees have come to an end. 5 L.L.J. 279. When a fund is attached subject to a lien it is binding on the judgment-debtors and those claiming under them. 21 O. 809. An order for rateable distribution is illegal when the rights of the mortgagees are ignored and the property is sold free from mortgage when in fact there was a mortgage. 22 M. 241.

THE PROVISO TO S. 73 (1) PROVIDES FOR SUCH CASES WHICH MAY BE DIVIDED INTO THREE KINDS.

- (i) *Where the property is sold subject to a mortgage or charge.*
- (ii) *Where the property is sold free from the mortgage or charge.*
- (iii) *Where immoveable property is sold in execution of a decree ordering its sale for the discharge of an incumbrance thereon.*

The provisos (a) and (b) of S. 73 have reference only to sales in execution of simple money decrees and to the modes in which the sale proceeds are to be rateably distributed; while proviso (c) has reference to sale in execution of decrees creating a charge on the property. 5 A. 566; 12 A. 546; 7 N.W.P. 91.

Difference between a money decree and a mortgage decree with respect to lien created on the property.—The only difference between such decrees is that the former creates a lien only from the date of attachment whereas the latter creates such a lien from the date of the decree. 10 O. 567.

WHERE THE PROPERTY IS SOLD SUBJECT TO A MORTGAGE OR CHARGE.—Where any property is sold subject to a mortgage or charge, the mortgagee or incumbrancer shall not as such be entitled to share in any surplus arising from such sale. (S. 73 (1) (a).)

This proviso has reference only to sales in execution of simple money decrees. 5 A. 566.

SALE SUBJECT TO A MORTGAGE.—A judicial sale subject to a mortgage means a sale made expressly so subject, i.e., by the certificate of sale. 5 B. 470. Subject to a mortgage must be taken to mean "sold with notice of the mortgage and does not refer merely to properties which being the subject of an undisclosed mortgage happen to be sold in execution. 21 W.R. 43.

These words could not mean a sale ordered for discharge of more encumbrances than one. This clause applies when the property is actually sold subject to a mortgage and the transaction is such that the purchaser is buying only the equity of redemption. 14 W.R. 209 ; 6 W.R. Mis. 13 ; 24 W.R. 305 ; 21 W.R. 43.

RIGHT OF THE MORTGAGEE.—Where property has been attached in execution of a money decree a person having a mortgage thereupon can apply to the Court that the property might be sold subject to his lien and possession as mortgagee. 6 B. 584. Where property is sold subject to a mortgage, the auction-purchaser merely buys the judgment debtor's rights. Under S. 73, C.P. Code, the mortgagee retains his rights against the property and has no claim on the sale proceeds or any part thereof. 3 L.B. R. 258. A mortgagee is not entitled to bring to sale the property covered by his simple mortgage, subject to the usufructuary mortgage in his favour, nor can he bring to sale the whole property for all his mortgages, simple or usufructuary. 25 A. 14.

ENQUIRY.—The executing Court has jurisdiction to enquire into the validity of the mortgage rights of any person. 6 B. 584. Unless the mortgagee consents the decree-holder has no right to bring the property itself to sale and all he can sell is the residual right of the mortgagor, that is, the right to recover the property on payment of the mortgage money. If either the fact of the mortgage or the amount of the mortgage money be disputed, the proper procedure for the Court is to make an enquiry with a view to ascertaining, what the exact nature of the mortgagee's claim is and how far it is admitted by the decree-holder, and then to state the result of the enquiry in the proclamation of sale. 51 I.C. 750 = (1919) 3 U.B.R. 139.

WHERE THE PROPERTY IS SOLD FREE FROM MORTGAGE OR INCUMBRANCE.—Where any property liable to be sold in execution of a decree is subject to a mortgage or charge, the Court may with the consent of the mortgagee or incumbrancer order that the property be sold free from the mortgage or charge, giving to the mortgagee or incumbrancer the same interest in the proceeds of the sale as he had in the property sold. (Proviso (b)).

SCOPE.—This proviso has reference only to sales in execution of simple money decrees. 5 A. 566. This clause applies only to a mortgagee whose charge is valid against the executing decree-holder. When he holds a money decree apart from his mortgage he can apply for rateable distribution. 74 I.C. 140.

DISCRETION OF THE COURT.—Where an application is made under this proviso the Court is not bound to grant such an application and ought not to inquire into the merits of the alleged mortgage further than is necessary for the purposes of O. 21, r. 66, for if the mortgage is good the rights of the mortgagee over the property are not affected, even if the Court sells the property as being encumbered. 3 L.B.R. 275.

ANY PROPERTY.—The words include moveable as well as immoveable property and a decree may be had on the security of moveable property. 80 I.C. 20 (O.).

RIGHTS OF THE MORTGAGEE.—When property is sold free from a mortgage the auction-purchaser becomes the absolute owner thereof. The mortgagee ceases to have any rights against the property, his rights being transferred to the sale proceeds paid into Court. 3 L.B.R. 258; 64 I.C. 417 = 13 Bur. L.T. 210.

WHERE IMMOVEABLE PROPERTY IS SOLD IN EXECUTION OF A DECREE ORDERING ITS SALE FOR THE DISCHARGE OF AN INCUMBRANCE THEREON.—Where any immoveable property is sold in execution of a decree ordering its sale for the discharge of an incumbrance thereon, the proceeds of sale shall be applied

- first, in defraying the expenses of the sale;
- secondly, in discharging the amount due under the decree;
- thirdly, in discharging the interest and principal monies due on subsequent incumbrances, if any; and
- fourthly, rateably among the holders of decrees for the payment of money against the judgment-debtor who have prior to the sale of the property applied to the Court which passed the decree ordering such sale for execution of such decrees, and have not obtained satisfaction thereof. (Proviso (c)).

SCOPE.—Proviso (c) has reference to a sale in execution of a decree enforcing a charge. 5 A. 566. This proviso operates only when the litigant concerned has himself obtained a decree and obtained an order for rateable distribution in execution thereof. 19 C.W.N. 535 = 19 I.C. 226; 51 I.C. 580 = 12 Bur. L.T. 43. Where property is sold in execution of a mortgage decree, and there are other decree-holders who attached the property prior to the realisation of sale proceeds, the sale must continue, after the realisation of the mortgage decree, for the realisation of other decrees. 17 M.L.J. 80. This clause does not apply when the amount due on the incumbrance has not been ascertained as the Court is not in a position to apply the surplus proceeds after defraying the expenses of the sale and prior incumbrances. 33 C. 92; (41 C. 654 P.O. affirming 33 C. 92).

WHEN THERE ARE SEVERAL MORTGAGEES.—When there are several mortgages and the property is not sold at the instance of all the mortgagees it cannot be sold free from their respective liens. 10 C. 567 ; 3 L.B.R. 275.

RIGHTS OF THE MORTGAGEES.—Right to interest.—Where a part of the mortgaged property is sold under S. 73, the plaintiff is entitled to recover interest on the sale proceeds and there is no duty imposed on him under the section to draw the amount due out of Court and apply it in the part satisfaction of the mortgage-debt. 10 I.C. 552. A mortgagee who does not obtain a decree on his mortgage or charge has no right to obtain by an order in execution, or by application, payment of any part of the sale proceeds of the property over which he claims his mortgage or charge, and a suit lies against him to refund the amount if paid to him. 26 I.C. 273. The discharge of any subsequent and not prior incumbrances is to be taken into account. 5 A. 566. Under this proviso, a mortgagee is entitled to claim in satisfaction of the mortgage-debt due to him, the surplus proceeds arising from the sale of the mortgaged property in a suit by the prior mortgagees. 30 C. 953. Once a sale takes place in execution of a mortgage decree and it is sufficient to satisfy the claims of other incumbrancers, a subsequent sale is not necessary for the purpose. 3 A. 579. Where there were two mortgages of the same property each covering a moiety without further specification and the property was attached in execution of both the decrees, the purchaser at a sale in execution of one of the decrees, took one of the moieties only subject to the other mortgagee's lien notwithstanding the whole interest of the mortgagor was intended to be sold. 10 C. 567. The sale proceeds are to be applied in satisfaction of incumbrances according to their priority. 7 A. 379. As between registered and unregistered mortgagees, a registered mortgagee, though his mortgage is subsequent in date, has a priority over the unregistered mortgagee in the distribution of sale proceeds and the holder of an unregistered mortgage has priority over the holder of money decrees. 18 B. 684. A mortgagee with possession let the mortgaged property to the mortgagors under the stipulation that they should pay rent in lieu of interest. He cannot contend that the arrears of rent are a charge on the land as against the incumbrance of a puisne mortgagee. 9 M. 57.

"A DECREE ORDERING THE SALE IN ENFORCEMENT OF A MORTGAGE OR CHARGE".—The incumbrance does not include other incumbrances charged in favour of the incumbrancer which he got subsequently. The rights of the incumbrancers intervening between the two such incumbrances are to be guarded. 12 A. 546 ; 12 A. 537.

THE RIGHTS OF GOVERNMENT HAVE PREFERENCE OVER ANY OTHER CLAIMS.—5 Bom. H.C. 23. The principle that the Government takes precedence of all other creditors is not subject to an exception in the case of lien-holders. 2 A. 196 ; 1 A. 596 ; 33 C. 1040 ; 29 A. 537 F.B. ; 25 M. 457 ; 18 B. 237. It has been provided in O. 33, r. 10 that the amount of Court-fees in a pauper suit shall be a first charge on the subject-matter of the suit. Hence no other decree-holder can claim rateable distribution with the Government. Where the Government instead of proceeding against the arrears of maintenance (in the case of a decree for maintenance in favour of a pauper), from which the costs were ordered to be recovered, proceeds to sell the property charged for maintenance, the effect of sale would be a sale of equity of redemption subject to the plaintiff's charge for maintenance. 1926 O. 859.

REGISTERED CO-OPERATIVE SOCIETIES.—A Registered Co-operative Society cannot by an application under S. 73, C. P. Code, enforce its prior claims within the meaning of S. 19 of Act II of 1912 as against a judgment-creditor at whose instance property is going to be sold, if they have no decree or a charge under S. 20 of the said Act. 18 C.W.N. 1140=42 C. 377.

SUIT FOR REFUND.—The scheme of S. 73 is to enable the Judge as a matter of administration to distribute the price according to what seems to be the rights of parties, without this distribution importing a conclusive adjudication on these rights which may be subsequently re-adjusted by a suit under sub-S. (2). 23 A. 313, P.O. ; 36 P.L.R. 1916=29 I.C. 791 ; 13 C. 159 ; 15 W.R. 219. A suit as provided by S. 73 and not an application must be filed by a person who claims, as a decree-holder, rateable distribution of assets realised by sale and prays for refund of money paid to another decree-holder. 40 P.L.R. 1920. In the absence of extrinsic fraud and collusion it is not open to one decree-holder of a judgment-debtor to attack the decree obtained by another decree-holder against the same judgment-debtor seeking rateable distribution, as not creating a valid debt and entitling the decree-holder to share in the distribution of assets under S. 73. 43 M. 381 ; 40 M. 381 ; 38 M. 221. A suit lies under S. 73 (2) to compel a refund of assets paid under this section, to a person not entitled thereto. 39 A. 322 ; 8 I.C. 1176=9 W.R. 514.

Suit for a declaration.—A rival decree-holder need not wait for the distribution of the assets before bringing a suit for a declaration that the decree of one of the decree-holders was obtained by fraud and collusion and that he was not entitled to share in the rateable distribution. 43 M. 381 ; 38 M.L.J. 108 ; 3 C.L.J. 385 (*contra* held in 11 C. 718). The plaintiff's remedy is not confined to a suit under S. 73 (2). 38 M.L.J. 108. One decree-holder can prove collusion between a judgment-debtor and another decree-holder to disentitle the latter to rateable distribution. 23 M.L.J. 699. A decree-holder must have obtained his decree *bona fide* in order to be entitled to rateable distribution, otherwise the section would give rise to a great deal of fraud. 11 C. 42 ; 13 B. 154 ; 16 C.L.J. 582=17 O.W.N. 326. A suit by an auction-purchaser for recovery of the purchase money from those to whom it had been paid, on the ground that the judgment-debtor had no saleable interest in the property sold, does not lie. 65 I.C. 230. For other rulings see *supra* Chapter VIII. A suit by the purchaser of the equity of redemption of the mortgagor is barred by an order under S. 73 for the payment of surplus sale proceeds to the assignee of a third mortgagee in execution of a first mortgagee's decree. 65 I.C. 230.

Cause of action.—The cause of action for a suit for refund does not arise until the money is paid ; and a suit for money remaining in Court under a prohibitory injunction obtained by the plaintiff himself before suit would be premature. 11 C. 718 ; 7 M.L.J. 277 ; 16 A.L.J. 530=46 I.C. 101. The cause of action under the section arises out of a wrong distribution of assets and is entirely without relation to the manner in which those assets were obtained. 65 I.C. 230 ; 5 A. 577. Where assets are not liable to rateable distribution a suit under S. 73 does not lie. 42 M.L.J. 473=67 I.C. 546 ; A suit lies against a decree-holder who purchases in execution of his own decree and with a view to avail himself of the benefit of a set-off under O. 21, r. 72 refuses to pay the money into Court for being available for rateable distribution. 11 M. 356.

Who can sue.—Any person entitled, under S. 73, to rateable distribution of assets can bring a suit for refund. 8 O.C. 86.

Necessary parties.—It is absolutely necessary that when a suit for refund is instituted the Court should have before it all the parties to the distribution, when it has to decide whether the distribution has been effected upon a proper principle. 13 C. 159 ; 27 C. 498 ; 23 W.R. 434.

Limitation for the Suit.—The limitation for a suit of this kind is provided in Art. 162 of the Limitation Act. The suit must be brought within three years from the time of the receipt of assets by the defendant. 15 B. 438 ; 39 M. 62 ; 39 A. 322 ; 27 M.L.J. 640 ; 41 C. 660 P.O. ; 1 A. 333 F.B. ; 1 Bom. L.R. 795 ; 23 A. 313 P.C. ; 24 B. 533. Such a suit is not governed by Art. 13 of the Limitation Act. 23 A. 313 ; 65 P.R. 1895 ; 15 B. 438 ; 9 M. 57 ; 12 C. 499 ; 1 A. 333 F.B. ; 26 I.C. 219 ; 1 Bom. L.R. 795.

17 W.R. 227 (*contra* in 13 C. 159). Art. 132 applies when a mortgagee seeks relief under S. 73 who is deprived of his rights to the sale proceeds. 41 C. 654 P.O.

Jurisdiction of Small Cause Courts.—A suit for obtaining a refund of money taken out under an order of Court is not cognizable by a Court of Small Causes. 7 A. 378; 5 C. 494; 9 M. 250 (*contra* held in 3 A. 59).

APPEAL AND REVISION FROM THE ORDERS UNDER S. 73.—No appeal lies against an order for distribution of assets under S. 73. 1 A. 33 F.B.; 6 W.R. Mis. 74; 14 A. 210; 2 W.R. 21; 9 W.R. 14 F.B.; 21 W.R. 194; 1 L.W. 234=23 I C. 422; 12 Bom. L.R. 366; 42 O. 1; 14 A. 210; 36 C. 190; 2 W.R. Mis. 41; 3 W. R. Mis. 1; W.R. F.B. 116; Marsh 527; 22 M.L.T. 70; 12 I.C. 911; 23 C.W.N. 169; 51 C. 761; 67 I.C. 546=1922 M. 99; 32 M.L.J. 155; 57 I.C. 421. Where an order is made under S. 73, dismissing an application for rateable distribution on the ground of limitation, no appeal lies from the order. 14 A. 210. An order refusing rateable distribution under S. 73, between two rival decree-holders, is an order in execution proceedings but is not a decree and hence not appealable. 30 C. 190; 42 C. 1. Orders under S. 73 are appealable if they affect parties to the suit. A party to whom a right of appeal is given by S. 47, O.P. Code, should not be deprived of it unless the O.P. Code expressly denies it to him and as there is no denial in S. 73, an order passed under S. 73 is appealable under S. 47 if the order is one between the parties to the suit. 39 M. 570; 31 M.L.J. 820=37 I.C. 900; 90 I.C. 869=49 M.L.J. 375. An order determining questions arising between rival decree-holders is not appealable. 42 C. 1; 9 W. R. 514. Similarly an order determining questions between the judgment-debtor and one of the decree-holders is not an order under S. 47 and is not appealable. 15 M.L.T. 32. No revision lies from an order of the Court under S. 73 on an application for rateable distribution. 4 M.L.J. 87; 1 C.W.N. 633; 2 A.L.J. 370; 15 A. 405; 65 P.R. 1905; 128 P.R. 1906; (1912) M.W.N. 956=17 I.C. 389; 176 P.L.R. 1912; 17 I.C. 254; 9 M. 57; 82 P.R. 1905; 27 M.L.J. 640; 2 U.B.R. 274; 25 I.C. 592; 57 I.C. 421; 26 C.W.N. 169; 60 I.C. 371; 1 Bur. L.T. 40; 16 M.L.T. 90 (*contra* held in 17 M. 410 and 8 A. 111). When a mere efficacious remedy can be had by a regular suit and where the result of interference by the High Court will affect the rights of parties not before it, the High Court will not interfere in revision. A mere error of procedure as distinct from an error of law is no ground for revision. 25 I.C. 592=(1914) M.W.N. 738. The High Court will not interfere in revision with orders allowing or disallowing claims for rateable distribution except in very exceptional circumstances. 60 I.C. 371 (L.). The special remedy by way of suit does not prevent a Court from interfering under S. 115, C. P. Code, where there is a manifest error in the order. 1926 M. 179=91 I.C. 11. A Court in receiving and disposing of an application under S. 73 in defiance of the conditions, on the existence of which the jurisdiction rests exercises its jurisdiction with material irregularity and its order is open to revision. 80 I.C. 40. The High Court can interfere in the exercise of its revisional jurisdiction vested in it by reason of an erroneous interpretation of the provisions of S. 73. 15 C.W.N. 872=10 I.C. 527. See also 4 I.C. 52; 26 C.W.N. 169. When the Court held that it had no jurisdiction to give the applicant a rateable share and referred him to a separate suit the High Court can interfere in revision under S. 115, C.P. Code. 10 O.C. 129; 32 M. 334; 15 C.W.N. 872=10 I.C. 527; (1914) M.W.N. 738. If pursuant to an erroneous order of a Court money is paid out to a litigant, the High Court can direct restitution under its inherent powers. 30 I.C. 49.

NATURE OF THE ENQUIRY UNDER S. 73, C. P. CODE.—The enquiry under S. 73 is non-judicial and a Court charged with the distribution of assets is only acting ministerially in apportioning the monies realised in execution. It has therefore no power to enquire into the *bona fides* or otherwise of a decree on the strength of which rateable distribution is claimed. 40 M. 841; 38 M. 221; 24 Bom. L.R. 1 F.B.; 43 M. 381;

19 N.L.R. 172=1924 N. 39; 23 M.L.J. 699; 65 I.C. 600 (M.); 23 A. 313. The Calcutta and Bombay view is that it is competent to the Court to investigate whether any of the decree-holders who claim rateable distribution is a benamidar for a judgment-debtor or not. 16 O.L.J. 582=17 C.W.N. 326; 1 C.W.N. 633=16 I.C. 795; 19 C.W.N. 903=22 I.C. 407; 11 C. 42; 15 W.R. 219; 46 B. 635. A decree-holder can show that a decree obtained by another decree-holder under which the property is attached is no more a subsisting decree and is barred by time. If the Court is satisfied that the decree is really barred, it is competent to see that he should not have any benefit in the distribution of the sale proceeds. 15 W.R. 219; Also see 13 B. 154. In case of conflict between the rival decree-holders the Court should ascertain the fact of priority. 47 I.C. 296=24 M.L.T. 179; 42 I.C. 897=(1917) M.W.N. 859.

WHAT IS RATEABLE DISTRIBUTION.—A obtains a decree in Court against B for Rs. 4,000, and applies to that Court for execution of his decree by attachment and sale of certain property belonging to B and the property is attached. C then obtains a decree against B in the same Court for Rs. 2,000, and applies to that Court for execution by attachment and sale of the same property. The property is then sold for Rs. 1,200. C is entitled to share rateably in the sale proceeds. If the costs of realisation are Rs. 300, the net sale proceeds are Rs. 900 and A and C will be paid in the ratio of 4000 : 2000 or 2 : 1, i.e., A will get Rs. 600 and C will get Rs. 300. The right to rateable distribution is limited to the amount due under the decree and does not apply to costs of a previous application for execution. 47 C. 515. It is only unsatisfied portions of the decrees that are to be taken into account in a question of rateable distribution. 3 C.W.N. 368. Where a decree-holder permitted to bid under O. 21, r. 72, purchases the property subject to a mortgage and pays the mortgage-debt, the decree-holder so paying, is not entitled to deduct the sum so paid from the amount of the purchase money before the Court could determine the amount liable for rateable distribution. 12 C. 499. Permission to bid and set off, to a decree-holder does not affect the right to rateable distribution of another satisfying the conditions of S. 73. 12 L.W. 328=59 I.C. 86.

OTHER CONDITIONS FOR RATEABLE DISTRIBUTION.—KNOWLEDGE OF THE DECREE-HOLDER REALISING ASSETS NOT NECESSARY.—It is not necessary that an application for rateable distribution must be made in such a way that the decree-holder at whose instance the assets have been realised must have knowledge of the application. 27 A. 132.

ORDER FOR RATEABLE DISTRIBUTION AFTER THE ASSETS ARE REALISED.—When no assets have been realised, an order for rateable distribution in anticipation of the assets being realised is not justified. 28 C.W.N. 988=84 I.C. 747.

DISCRETION OF THE COURT TO REFUSE PAYMENT TO DECREE-HOLDERS.—The Court may in its discretion refuse payment to the decree-holders until the sale is confirmed, but in such a case it should provide for the due payment of interest on the money so detained. 12 B. 252. The Court has no discretion to refuse rateable distribution to any one of the decree-holders. 32 M. 334.

NOTICE TO RIVAL DECREE-HOLDERS.—Applications for rateable distribution should be dealt with after notice to the rival decree-holders whose interests may be seriously affected thereby. 13 O.C. 282.

LIMITATION FOR AN APPLICATION FOR RATEABLE DISTRIBUTION.—While an application for execution is pending in a Court an application for rateable distribution to another Court, though after 12 years from the date of the decree is not barred by S. 48 as it is held to be in continuation of the application made to the former Court. 41 M.L.J. 878=(1921) M.W.N. 507.

CALCULATION OF DECRETAL AMOUNTS FOR RATEABLE DISTRIBUTION.—

Rateable distribution of assets is limited to the amount of decree unsatisfied and cannot be extended to the costs of execution, unless prior to the application there was an order that such costs are to be added to the decretal amount. 47 C. 515.

MONEY BELONGS TO THE DECREE-HOLDERS AFTER AN ORDER OF RATEABLE DISTRIBUTION.—When money has been allowed to various decree-holders by an order for rateable distribution and stands to the credit of their respective suits, it is no longer the property of the judgment-debtor, but it remains the property of various decree-holders even though the amount has not been paid out to them. 42 M.L.J. 361=68 I.C. 512.

EFFECT OF SATISFACTION OF THE DECREE IN EXECUTION OF WHICH THE PROPERTY WAS ATTACHED.—When the decree in execution of which the property was attached was satisfied and there had been a withdrawal of the attachment the second creditor who has obtained an order for a rateable distribution in the assets in the sale proceeds of property attached by the former creditor, has no claim to the benefit of the attachment. 81 P.R. 1908; 7 A. 701; 15 O. 771; 25 A. 431; 28 M. 380; 6 P.R. 1901; 21 P.R. 1875; 25 B. 202; 137 P.L.R. 1905; 23 A. 106; 28 B. 264; 4 N.L.R. 45. When a decree is satisfied out of Court and the sale of the attached property was not effected, then a sale by the judgment-debtor of the property at the time of attachment was not bad as against a decree-holder merely because he had applied prior to the sales for rateable distribution of assets. 5 P.R. 1919.

PROCEDURE IN EXECUTION.—When the first attaching creditor is proceeding with the execution of his decree, the Court should refuse to hear the application of any other decree-holder applying under S. 73, C.P. Code, with respect to any matter arising in such execution, but if such creditor is unwilling to proceed or if he dies and no legal representative of his makes any such application, then the Court has power to make any of the other decree-holders applying under S. 73, a decree-holder whose application for execution is to be proceeded with. 10 M. 57.

SURETY'S LIABILITY AND RATEABLE DISTRIBUTION.—A surety's liability is unaffected by rateable distribution of principal's assets and if the amount payable by the principal is not wholly paid off by the rateable distribution the surety is liable to the extent not satisfied. 30 M. 167.

INSOLVENCY AND RATEABLE DISTRIBUTION.—The insolvency of the judgment-debtor introduces a new state of things from the date of vesting order but an order under this section for rateable distribution for debts prior to the insolvency is not affected by it. 27 O. 351. When sums are realised, an order for rateable distribution prior to the vesting order is not affected by the insolvency of the judgment-debtor. 15 M. 372; 34 I.O. 429; 41 A. 274; 23 O.W.N. 461.

LIQUIDATION AND RATEABLE DISTRIBUTION.—The property of a limited liability company attached before its liquidation does not vest in the liquidator although in the case of an Insolvent's estate it is different. The attachment gives a right to the decree-holders to distribute the proceeds of sale among themselves rateably in preference to the rights of the liquidator. 34 I.C. 253.

CHAPTER XI.

PART I.

LIMIT OF TIME FOR EXECUTION.

(1) Where an application to execute a decree, not being a decree granting an injunction, has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiry of 12 years from—

- (a) date of the decree sought to be executed, or
- (b) where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date, or at recurring periods, the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree.

(2) Nothing in this section shall be deemed—

- (a) to preclude the Court from ordering the execution of a decree upon an application presented after the expiry of the said term of twelve years, where the judgment-debtor has, by fraud or force, prevented the execution of the decree, at some time within twelve years immediately before the date of the application, or
- (b) to limit or otherwise affect the operation of article 183 of the second schedule to the Indian Limitation Act, 1908. (S. 48.)

LEGAL CHANGES.—(1) The provisions of the old S. 290 of the Code of 1882 (corresponding to the present S. 48) applied only to decrees for the payment of money or delivery of other property, and it was doubtful whether the section applied to a mortgage decree or not. 19 I.O. 899. The present section applies to all decrees except decrees granting an injunction. 39 B. 256; 18 I.O. 897; 24 I.O. 35—18 C.W.N. 492; 40 C. 704; 32 I.O. 89; 27 I.O. 969.

(2) The provisions of S. 290 applied only where an application for execution had been "made under the section and granted." The words in thick type have been omitted in the present section. The result is that the rule of limitation contained in this section applies whether the previous application for execution was made and granted under this section or not. The rulings which granted a fresh application after the expiry of twelve years are no longer law. See 6 A. 189 F.B. and 27 P.R. 1905.

(3) The words "or the decree (if any) on appeal offering the same," which occurred in cl. (a) of S. 230 of the old Code have been omitted as being unnecessary and calculated to give rise to the contention by reason of the word "affirmed", that when the original decree was modified or set aside on appeal the period of 12 years was to run from the date of the original decree.

(4) The words "or at recurring periods" in sub-S. (1), cl. (b) are new. They are added to give effect to certain decisions under S. 220 of the old Code, e.g., 12 B. 65; 14 M. 396.

(5) Cl. (2) (b) is new and hence this section does not apply to decrees and orders of Chartered High Courts and Privy Council orders and decrees.

SCOPE.—This section, as the heading shows prescribes the period of limitation for the execution of decrees. It does not supersede the law of limitation as enacted in Art. 182 of the Limitation Act, 1908. It only fixes an outside period after which an application for execution of a decree, though not barred by the Limitation Act, may not lie. 109 P.R. 1889; 9 P.R. 1891; 46 A. 73; 27 P.R. 1888. S. 48 deals with the maximum limit of time prescribed for execution and does not prescribe the period within which each application for execution is to be made. 21 A.L.J. 861; 1879 P.J. 573; 1879 P.J. 574; 39 B. 256. The period of a first application for execution is fixed three years as prescribed by the Limitation Act, Art. 182. Any number of successive applications for execution may be made up to a limiting period of twelve years and the Court has no power to refuse execution provided that the provisions of Art. 182 of the Limitation Act are adhered to. 38 M. 199; 11 I.O. 385=13 C.L.J. 532. There might be a succession of applications for execution. 17 A. 106. An application for execution may be barred under this section, though it may not be barred under Art. 182 of the Limitation Act or by *res judicata*. 39 B. 256; 15 A. 84. The section bars only a fresh application, and not an application, which in effect is only a continuation of a prior application. 21 I.O. 923; 40 P.R. 1898. Decrees of every description except decrees for injunction are covered by this section. 128 P.R. 1894; 9 P.R. 1891; 27 P.R. 1886; 109 P.R. 1889.

Section 48 would apply when a combined decree is passed under Ss. 88 and 90, T.P. Act, and is executed for the realisation of the balance after the sale of the mortgaged property and an application for execution after 12 years from the commencement of proceedings against the judgment-debtor's person and his other property will be barred. 31 C. 792. Where a mortgage decree directs the mortgaged properties to be sold and the balance to be realised from the other properties and person of the judgment-debtor, the period of 12 years under the section for an execution of the latter part of the decree must be calculated from the date of the mortgage decree. 82 I.O. 827. This section should be strictly construed as it restricts a right. 18 A. 482 F.B. The object of this section is to protect the judgment-debtor from being subject to execution proceeding, without limit in point of time. 128 P.R. 1894; 5 M. 141.

COMPROMISE DECREES.—The section is wide enough to be applicable to compromise decrees. 39 B. 256.

INSTALMENT-DECREE.—When an instalment decree is made payable wholly compulsorily on default of payment of any one instalment, the time for the recovery

of the whole amount begins to run from the date of the first default so that if execution in respect of one instalment is allowed to become barred by time, the whole decree becomes barred. 49 I.O. 497.

THE DECREE MUST BE EXECUTABLE.—Before the bar created by S. 48 can apply it must be shown that the decree was in all respects ripe for execution on the date from which the 12 years' period of limitation is computed. 36 B. 368; 54 I.O. 924. S. 48 has no application to the case of a reversal of an antecedent application for execution which has been in suspense by reason of some bar or which has been stayed pending the determination of a subsequent litigation. The period of limitation in such cases is that provided by Art. 181 of the Limitation Act, i.e., three years from the date of the removal of the bar. 44 I.C. 660=3 Pat. L.J. 103.

Limitation for a decree passed by a foreign Court.—The period of limitation provided in S. 41 of the C.P. Code applies to fresh applications for execution of decrees passed by the foreign Courts, which are transferred for execution to the British Indian Courts. 35 B. 103.

DECREE FOR MONEY.—A decree passed against three persons as lessees and another person as their surety making the money payable by the lessees in the first instance in certain instalments, and in the event of their default providing that it might be recovered by sale of the property mortgaged by the surety is a decree for payment of money so far as the lessee defendants are concerned. 6 A.L.J. 79=19 I.O. 187; 31 A. 636. A mortgage decree is not a decree for the payment of money. 18 I.O. 455.

Combined decree for money and mortgage.—A decree providing for the payment of the mortgage money and for the sale of the properties of the mortgagor on default is a decree for the payment of money. 43 I.O. 122. A mortgage decree directing that the defendants be personally liable for any balance not obtained by the sale is not a decree for the payment of money. 29 I.C. 556. The mere fact that a decree passed against the representatives of a deceased person as such is limited as regards the judgment-debtor's liability to immoveable property of the deceased which may come into the hands of the representatives will not make the decree other than a decree for money. A.W.N. (1898) 118.

RETROSPECTIVE EFFECT.—Section 48 of the C.P. Code has a retrospective effect, and governs an application for execution of a mortgage decree passed before that Code came into force. Hence such an application, if presented twelve years after the date of the decree is barred. 22 Bom. L.R. 1420=59 I.O. 790; 27 I.O. 969=11 N.L.R. 25; 39 I.O. 141; 19 I.O. 899; 21 I.O. 923; 46 B. 365; 40 C. 704; 34 I.O. 27=20 C.W.N. 952; 78 I.O. 1030; 16 M.L.T. 399; 27 Bom. L.R. 461; 1926 A. 93=90 I.O. 274. A contrary view is taken by the Allahabad High Court and it is held that the section does not operate retrospectively. 92 A. 499 (dissented from in 90 I.O. 274 P.C.). The mere fact of the coming into force of the new Code pending a suit on a mortgage does not make the new S. 48 applicable to proceedings in execution of the decree in that suit. 47 I.O. 143.

SUBSEQUENT ORDER.—The "subsequent order directing payment" in S. 48, cl. (b) means a subsequent order made by the Court which passed the decree and not an order of a Court executing the decree. 58 I.O. 393=(1920) Pat. 229; 40 A. 198; 7 M. 152; 34 I.O. 393; 1923 L. 678=73 I.O. 79; 21 L.W. 29; 49 B. 695. Where a Court executing a decree allows a judgment-debtor two months' time to pay up the decree, the order allowing the time is not a subsequent order within the meaning of S. 48 and does not give a fresh period to the decree-holder to execute the decree. The order giving time is not an order staying execution or an injunction and in computing

time the period cannot be excluded. 40 A. 198. Where a subsequent order directs any payment of money or the delivery of any property at a future date the period of 12 years prescribed begins to run from such date and not from the date of the original decree. 5 P.L.R. 1909=1 I.C. 48. When an agreement is entered into by one of the judgment debtors, it only affects him and he is unable to avail himself of S. 22 of the Limitation Act which is not applicable to such cases. 5 P.L.R. 1909=1 I.C. 48. The mere fact that an arrangement for paying off a debt by instalments is filed, but is not carried out by an order of Court will not turn the proceedings into an order. A.W.N. (1882) 5; A.W.N. (1883) 147; 4 A. 155. An order of the executing Court in the course of execution proceedings that the debtor should pay a certain sum per month in discharge of the decree, is not a subsequent order. 13 I.C. 88=15 O.L.J. 678.

DATE OF THE DECREE.—When the decree is drawn up some time after the judgment the date of judgment is the starting point of limitation for 12 years. 42 B. 309; 1 C.W.N. 93. Date of the decree means the date when it is capable of execution. 36 B. 368; 11 O.C. 22; 112 P.L.R. 1902; 6 C.L.J. 462; 19 C. 132; 24 C. 173; 11 C.L.R. 17; 19 A. 520; 31 C. 792; 23 B. 592; 13 B. 567; 19 B. 480; 8 A. 56; 4 P.W.R. 1909; 54 I.C. 924; 40 M. 989 F.B.; 24 I.C. 244=16 M.L.T. 399. *Contra* held in 34 A. 636; 24 I.C. 35=18 C.W.N. 492. It is the date of the final decree. 23 C.L.J. 573. When no relief is asked for in the appeal against certain defendants against whom a decree is passed by the lower Court, the period of limitation runs from the date of the decree of the trial Court. 25 Bom. L.R. 371=73 I.C. 310.

Decree directing accounts.—In case of a decree directing certain accounts to be taken and sum to be drawn, time runs from the date of the original decree and not from the date when the same is ascertained. 20 C.W.N. 950. When a decree is passed under the Dekhan Agriculturists' Relief Act, there is no necessity to apply to the Court to make it absolute. On default of payment of any instalment execution can be applied for. An application for execution more than 12 years after the date when the decree could be executed is barred under this section. 46 B. 761. The limitation begins to run from the date of appellate order in respect of a decree appealed against even when it is held that no appeal lies. 43 A. 405. The period of limitation under S. 48 for execution in a personal mortgage decree runs from the date of such decree. 34 C.L.J. 167. When a decree is amended the date of amendment is the date of the decree under S. 48. 60 I.C. 318 (Pat.); 17 A. 39; 5 A.L.J. 403; 42 B. 309. When the parties to the decree come into Court with an agreement to alter its terms according to which the Court passes an order, the date of the amendment is the date of the decree from which the period of 12 years runs. 1 I.C. 48=5 P.L.R. 1909. Where a decree directs that money is recoverable from a party only on the failure to recover from another party, time begins to run from the date of the decree against both. 1926 M. 20=48 M. 846; 22 C.W.N. 145 P.O.; 40 M. 289 F.B. overruled by the P.O. ruling. For other cases see rulings under Art. 182, Limitation Act, 1908. It may be noted that the words "or of the decree in appeal affirming the same" coming after the words "date of the decree" in the old section have been omitted.

CERTAIN DATE.—When a mortgage decree for sale also includes a provisional decree for recovery of any balance from the other properties of the mortgagor, in case the sale proceeds of the mortgaged property are found insufficient to satisfy the entire decretal amount, the period of 12 years starts from the date when the mortgaged properties are sold and the sale proceeds are found insufficient to satisfy the decree. 31 M.L.J. 513=37 I.C. 741 F.B.; 24 I.C. 35=18 C.W.N. 492; 33 M.L.J. 543=42 I.C. 282; 17 M.L.T. 424; 34 A. 636; 1925 M. 331; *contra* held in 40 M. 989 F.B.; 80 I.C. 827; 22 C.W.N. 145 P.O.; 45 I.C. 436 P.O. and 34 C.L.J. 167 in which case it is held that the time begins to run from the date of the decree. To render S. 48 (1) (b) applicable there must be an order of Court directing the payment of money on a

certain date. 72 I.C. 477. The right to apply for execution in a case when money is payable within six months of the decree, occurs from the date when default in making the payment occurs. 21 A.L.J. 861. Although a decree does not in express terms fix a specific date for payment, yet if it can be gathered from the decree as a whole that payments are directed to be made, on certain dates, the requirements of law are satisfied. 14 M. 396; 22 P.R. 1905. Payments to be made "harvest by harvest" are not payments to be made on certain dates. 19 P.R. 1889. A decree directed that a sum of Rs. 8,000 is due to the plaintiff for which a sum of Rs. 400 as interest will be paid annually to the plaintiff and the principal and interest due shall be recoverable on default of payment of interest for two years. It was held that the decree did not direct the amount to be paid at a certain date. 99 P.R. 1890.

RECURRING PERIODS.—A decree directing future payments though more than 12 years old is capable of execution. 9 B. 328. Decrees for annual or monthly payments fall under the clause. 13 P.R. 1892 F.B. Future maintenance awarded by a decree, when falling due could be recover in execution. 19 O. 139 F.B.; 15 W.R. 128; 9 A. 33; 2 B. 494; 9 B. 103; 10 M. 283. In such cases time runs from the date of default. 18 M. 482.

FRESH APPLICATION.—A subsequent application to execute the decree means a substantive application for execution in the form prescribed by O. 21, r. 11. 33 A. 517 F.B.; 18 A. 482; 9 C.L.R. 297; 3 O. 235; 2 M. 1; 15 A. 198. An application to substitute properties for those mentioned in a former application for attachment is a fresh application. 7 C. 556; 13 P.R. 1910. An application made after an order consigning the previous application to the record room is a fresh application. 155 P.L.R. 1912—14 I.C. 335; 20 B. 175; 21 M. 257. An application asking for relief by a different mode after the previous one is a fresh application. 18 A. 9; 8 M.L.J. 203. An application for sale is a fresh application when the prior application was for attachment of property against which there was a mortgage decree, as under such a decree there is no attachment. 28 M. 224. When the previous application was rejected on the ground that the relief prayed for could not legally be granted a subsequent application made more than 12 years from the date of the decree is a fresh application and barred. 75 P.L.R. 1909. An order on an application, "proceedings closed" does not amount to dismissal and hence a subsequent application is not a fresh application. 6 M.L.T. 333. An application simply to continue or revive pending execution proceedings is not a fresh application for execution. 44 I.C. 560—3 Pat. L.J. 103; 6 M.L.T. 333; 21 I.C. 923. An application for transfer of the execution case to another Court is not a fresh application. 34 A. 396; 20 A. 78; 16 O. 744; 22 C. 921; 35 B. 103. An application for sale is one in continuation of a former application for attachment. 7 I.C. 707—8 M.L.T. 367. An application for the arrest of the judgment-debtor, made in continuation of a previous application for execution by arrest which had been struck off, is not a fresh application. 21 A. 155. An application to the superior Court to which the execution proceedings are transferred, asking for relief is not a fresh application. 64 I.C. 493—41 M.L.J. 378. An application for rateable distribution is not a fresh application for execution. 64 I.C. 493. The decree-holder may apply even after 12 years if an application is already pending before the expiry of the period. 27 P.R. 1905.

EXTENSION OF TIME.—Section 19 of the Limitation Act.—The words a fresh period of limitation in S. 19 of the Limitation Act do not refer to the term of 12 years prescribed by S. 48, O.P. Code. 20 O.W.N. 952—34 I.C. 27; 11 O.C. 220; *Contra* held in 8 O.W.N. 470; 18 A. 384.

Property under the management of Collector.—The words "period of limitation" in cl. (3) of paragraph 11 of the third schedule of the O.P. Code apply to periods prescribed under the Limitation Act as also to periods mentioned in S. 48 of the Code.

When therefore the property of the judgment-debtor was taken under the management of the Collector and was released more than 12 years after the date of the decree *held* that the period during which it was under such management should be excluded from limitation of 12 years. 17 A.L.J. 1140; 16 L.W. 68; 13 O.C. 303; 19 B. 261; 27 M.L.J. 25; 11 N.L.R. 25; 42 A. 118.

Deduction of time during which the estate was under the management of the Court of Wards cannot be allowed when it has not been accompanied by a transfer of the decree to the Collector. 27 M.L.J. 25—24 I.C. 195.

Deduction of time in obtaining conciliator's certificate.—A decree-holder is entitled under S. 48 of the Dekhan Agriculturists' Relief Act to exclude the interval of time occupied in obtaining the conciliation certificate. 42 B. 367.

Stay of execution.—The time during which execution is stayed cannot be deducted from the period of 12 years prescribed by S. 48, C.P. Code. 54 I.C. 279. When execution is suspended by an injunction obtained by the judgment-debtor the limitation is extended. 20 I.C. 244.

Extension under S. 4, Limitation Act.—If the period of 12 years expires on the date when the Court is closed, the application may be made on the next re-opening day. 18 C. 631.

Minority.—The period of limitation under S. 48 is not extended on the ground of minority of the applicant. 36 B. 498; 37 M. 186; 37 A. 638; 27 I.C. 865—13 A.L.J. 166; 29 P.R. 1894; 128 P.R. 1894; 39 B. 256 (*contra* in 27 C. 374; 22 A. 199 F.B., under the old Code.)

Extension under S. 15 of the Limitation Act.—S. 48, C.P. Code, is not controlled by S. 15 of the Limitation Act and the period of 12 years cannot be extended thereunder. 45 M. 785; 10 L.W. 156; 40 A. 198; 12 A. 118; 54 I.C. 279.

EXTENSION OF TIME ON THE GROUND OF FRAUD.—Fraud on the part of the judgment-debtor at any stage of the execution proceedings gives a new starting point of limitation. 8 I.C. 905—9 M.L.T. 162. Fraud or force on the part of the judgment-debtor at any stage of the execution gives a new starting point for the period of limitation. 22 M. 320; 34 A. 20; 54 I.C. 279. A decree-holder is not disentitled to the benefit of S. 48 (2) by reason of the fraud being long anterior to the date from the last application. 10 L.W. 566—58 I.C. 862. The Court should not use its power of extending limitation unless it is satisfied that the decree-holder, on his part had been diligent in proceeding with the execution from the date of the decree. 35 M. 670. When there is no intervention of fraud or force which prevented the consideration of a previous application there is no suspension of execution. 20 C.W.N. 686—32 I.C. 931.

Fraud of one judgment-debtor.—The fraud of one of the judgment-debtors in preventing execution as against him does not operate to extend the time for execution under S. 48 as against the other judgment-debtors whatever might be the policy of the law under the Limitation Act. 38 M. 419 (on appeal from 35 M. 670). A decree-holder cannot take advantage of his judgment-debtor's fraud or force if he had ample opportunity to present a fresh application after the conclusion of fraud or force. 75 P.L.R. 1909—4 I.C. 958.

TIME FOR TAKING PLEA OF FRAUD.—It is doubtful if the decree-holder can raise question of fraud and claim the benefit of this section for the first time in appeal. 17 P.R. 1910.

EXPRESS FINDING.—There should be an express finding that there was fraud or force. 8 I.C. 805—9 M.L.T. 162.

FRAUD.—Fraud means any improper means resorted to in order to prevent execution. 24 M.L.J. 270; 22 M. 320; 13 I.O. 88=15 C.L.J. 678; 4 M. 292; 75 P.L.R. 1909. The word fraud in this section should not be narrowly interpreted. The Judges ought to take a broad view of conduct deliberately adopted by the judgment-debtors with a view to defeating and delaying the just payment of their debts by frivolous and futile objections which are dishonest on the face of them. *Per* Walsh, J. 20 A.L.J. 185. Frivolous objections by the judgment-debtor in order to cause delay in execution of the decree amount to fraud. 20 A.L.J. 185. Fraud in S. 48 should be understood in a large and liberal sense. The delaying of execution by frivolous futile and dishonest objections on the part of the judgment-debtor amounts to fraud. 44 A. 319; 6 A.L.J. 401; 9 A.L.J. 17. Any improper means resorted to in order to prevent execution would amount to fraud. 24 M.L.J. 270=18 I.O. 1008. Under S. 48 the word "fraud" is used in a much wider sense than that in which it is generally used in English law. Locking up the doors of a house so as to prevent attachment of moveable property or evading arrest by any contrivance and dishonestly evading payment by eluding service of warrant is fraud within the meaning of S. 48. 80 I.O. 905 (n). The word "fraud" in this section is to be interpreted in a wider sense than that in which it is generally used in English law. 6 M. 365. Locking up the house so as to prevent attachment of moveable property amounts to fraud. 9 B. 318; 22 M. 320. The mere fact that the judgment-debtor who is a *pardanashin* lady keeps her door closed is not evidence by itself of fraudulent conduct on her part unless there is anything to show that she deliberately does so or attempts to do so against the executing officer. 4 O.L.J. 345=40 I.O. 399. Evading arrest by any contrivance, or dishonestly evading payment by eluding service of warrant is fraud. 6 M. 365; 35 M. 670; 2 I. C. 222=6 A.L.J. 401; 4 M. 292; 9 B. 318; 22 M. 320; 8 I.O. 805; 13 I.O. 929; (1920) M.W.N. 788=60 I.C. 690=12 L.W. 410; 47 M.L.J. 428=80 I.O. 731; 6 P.L. R. 1910=6 I.C. 690; 11 C.W.N. 440. When a judgment-debtor evaded arrest and when subsequently arrested spent two years in pretending to prosecute insolvency proceedings without intending to press them and thus caused 12 years to elapse from the date of the decree, held that he was guilty of fraud and the application for execution was not barred. 9 A.L.J. 17=13 I.C. 929. A fictitious transfer of his property made by the judgment-debtor to defeat or delay the execution of the decree that may be passed against him amounts to fraud within the meaning of this section. 4 M. 292. The presentation by the judgment-debtor of an application to set aside a decree passed *ex parte* against him, the sole object of the application being to delay the proceedings in execution of the decree is fraud. 11 C.W.N. 440. The infructuous effort of the defendant to set aside the *ex parte* decree cannot have the effect of extending the period within which the plaintiff is allowed by law to execute it. 16 B. 123. When the judgment-debtor was justified in obtaining an adjudication from the Court in respect of the very difficult question of his relations with his father and when his appeal was thrown out merely on the ground of his failure to discharge the burden of proof that lay on him, he is not guilty of frivolous obstruction to the execution of the decree and there was no fraud. 17 P.R. 1910.

Taking objections under S. 47, O. 21, r. 90.—The judgment-debtors taking objections under S. 47 or O. 21, r. 90, which were unsustainable does not amount to fraud. 18 A. 482 F.B.; 21 M. 261; 7 I.O. 707; 45 P.R. 1909; 13 I.O. 88=15 C.L.J. 678. Institution of a suit by a person claiming title to the property on the foot of a mortgage which suit ultimately proved unsuccessful is not fraud. 19 A. 71; 13 I.O. 88. Institution of a suit by the decree-holder under S. 283, old C.P. Code (corresponding to O. 21, r. 63, of the new Code) who purchased the property in execution of the decree after the objection of the purchaser of the same property from the judgment-debtor had been allowed and which suit was afterwards successful, does not amount to fraud. 13 I.O. 88=15 C.L.J. 678. Evading process is fraud. 24 M.L.J. 270=18 I.O. 1008.

A deliberate evasion of the process of the Court with the intention to defeat execution of the decree would amount to fraud within the meaning of S. 48. 35 M. 670.

COMPUTATION OF TIMES.—The effect of the proviso embodied in S. 48 (2) is that the bar to execution created by the first clause of the same section is removed from any date on which it is held that the judgment-debtor had by fraud prevented execution of the decree. 34 A. 20; 1 O.W.N. 162; 22 M. 910. A judgment-debtor's continued absence from the jurisdiction of the executing Court is a continued fraud and keeps the right of the decree-holder to apply for execution, alive from day to day, during his absence from the jurisdiction of the Court. 80 I.C. 905. The twelve years are to be reckoned to the date of presenting the application and not to the date of granting it. 6 M. 359 (*contra* in 18 A. 49; 21 A. 155 no longer good law.) This is made clear by the addition of the words "presented after" in the present section.

APPEAL.—An appeal lies from an order under this section directing execution to issue against the judgment-debtor, under S. 47, O.P. Code. 26 I.C. 866 = 19 C.L.J. 581.

PART II.

ARTICLE 182, LIMITATION ACT.

Application.	Period.	Starting point.
For the execution of a decree or order of any Civil Court not provided for by Art. 183 or by Section 48, C. P. Code, 1908.	Three years, or where a certified copy of the decree or order has been registered, six years.	<ol style="list-style-type: none"> 1. The date of the decree; or 2. (Where there has been an appeal) the date of the final decree or order of the appellate court or the withdrawal of the appeal; or 3. (Where there has been review of judgment) the date of the decision passed on the review; or 4. Where the decree has been amended, the date of amendment; or 5. (Where the application next hereinafter mentioned has been made) the date of applying in accordance with law to the proper Court for execution, or to take some step-in-aid of the decree or order; or 6. (Where the notice next hereinafter mentioned has

Application.	Period.	Starting point.
		<p>been issued), the date of issue of notice to the person against whom execution is applied for to show cause why the decree should not be executed against him, when the issue of such notice is required by the C.P. Code, 1908 ; or</p> <p>7. (Where the application is to enforce any payment which the decree or order directs to be made at a certain date) such date.</p> <p><i>Explanation I.</i>—Where the decree or order has been passed severally in favour of more persons than one distinguishing portions of the subject-matter as payable or deliverable to each, the application mentioned in clause (5) of this article shall take effect in favour only of such persons or their representatives as it may be made by. But where the decree or order has been passed jointly in favour of more persons than one, such application if made by any one or more of them or by his or their representatives, shall take effect in favour of them all.</p> <p>Where the decree or order has been passed severally against more persons than one distinguishing portions of the subject-matter as payable or deliverable by each, the application shall take effect against only such of the said persons or their representatives as it</p>

Application.	Period.	Starting point.
		<p>may be made against. But where the decree or order has been passed jointly against more persons than one, the application if made against any one or more of them, or against his or their representatives, shall take effect against them all.</p> <p><i>Explanation II.</i>—Proper Court means the Court whose duty it is to execute the decree or order.</p>

DECREES OR ORDERS GOVERNED BY THE ARTICLE.—Orders of the Privy Council and decrees of Chartered High Courts.—Art. 183 provides for such orders and such decrees as are passed in the exercise of the ordinary original jurisdiction of the High Court. Decrees on the appellate side of these High Courts and orders of the Privy Council are governed by Art. 183. 10 B.L.R. 101 P.C. ; 5 M.H.C. 215 F.B. ; 7 B.L.R. 704 F.B.

Partition Decrees.—Proceedings to effect partition under a partition decree are proceedings in the original suit and hence, they are not subject to Art. 182 or Art. 181 of the Limitation Act. 22 O. 425 ; 28 M. 127 ; 47 P.R. 1906 ; 28 I.O. 211 ; (1915) M.W.N. 125 ; 17 M.L.J. 20 ; 30 I.O. 380. An application for a final decree in a partition suit is not one for execution under Art. 182. (1917) M.W.N. 327. The time of limitation runs from the date of the decree under Art. 182, Cl. (1) notwithstanding the fact that the decree was signed by the judge afterwards on account of the default of the parties in supplying the proper stamp in a partition decree. 72 I.O. 646. In case of a partition decree an application by the plaintiff to execute it keeps alive the decree in favour of the defendant for execution. 3 O. 551 ; 9 O. 568 ; P.J. (1886) 287. P.J. (1896) 271.

Decree for injunction.—Applications under O. 21, r. 32, C. P. Code, to enforce a decree for injunction are within Art. 182. 2 Bom. L.R. 116. When an injunction is disobeyed, Art. 182 does not preclude the Court from enforcing its authority. 23 A. 465 ; 28 A. 300. A decree for perpetual injunction may be enforced within 3 years of each successive breach under Art. 181 and not under Art. 182. 29 M. 314 ; 26 M. 780 ; 12 M. 386 ; 66 I.O. 166.

Pre-emption Decrees.—A pre-emption decree is incapable of execution until the decree-holder pays the pre-emption price into Court. But as it is open to the decree-holder to pay the price on the day the decree is passed it must be deemed to be capable of execution from the date of the decree. 26 M. 760 ; 28 M. 211 = 23 B. 592 ; (1910) M.W.N. 391 ; 10 I.O. 167 ; 1 A.L.J. 15. A contrary view is taken by the Allahabad High Court and held that Art. 181 applies in such cases and time runs from the date of payment of price into Court. 24 A. 300.

Decrees for mesne profits.—An application to ascertain mesne profits is not within Art. 181 or Art. 182. But where the amount of the mesne profits is ascertained

an application to realise them is under Art. 182. 19 C. 132 F.B.; 25 C. 203; 26 A. 623; 25 A. 385; 5 I.O. 272; 1 A.L.J. 126; 2 M.L.J. 216; 28 I.O. 211; 14 C. 50; 24 B. 149; 20 I.O. 685; 19 C. 132 F.B.; 24 C.L.J. 291; 11 C.L.R. 17; 11 C.L.R. 541. In a suit for redemption of a mortgage when a decree directs the mesne profits due to the mortgagee to be ascertained in the execution department time begins to run when the profits are so ascertained. 40 A. 211. A decree for accounts is governed by Art. 182, Cl. (1) even though the additional Court-fee is paid long afterwards. 19 I.O. 410=17 C.W.N. 959.

Decrees in mortgage suits.—Where a decree directs sale on non-payment within a time fixed by the decree, an application for execution is not within Cl. (7) as it is restricted to applications for enforcement of payment of money. Clause (1) also is not applicable as such a decree is not capable of execution at the date of the decree. Article 181 applies in such a case. 26 M. 780; 24 I.O. 35; 4 I.O. 42; 8 A. 56; 32 M.L.J. 455=41 I.O. 268. In the case of an application for the execution of a decree for sale in a mortgage suit, limitation runs from the date when the decree absolute is passed under Art. 182, Cl. (1). 18 I.O. 10. If there is also a personal decree against the mortgagor, and there is an application to enforce the personal liability, Cl. (1) or Cl. (7) would apply according as the decree is capable of execution at once or at a future date. 26 M. 780; 24 I.O. 35; 8 C.W.N. 251. A redemption decree is capable of execution on the date of its passing even though a period is fixed for the payment of the mortgage money, as it is at the option of the decree-holder to pay the money at once and get execution issued. 28 M. 211; 23 B. 592; 14 I.O. 10. Where no period is fixed for payment by the decree-holder, the mortgagor must execute it, by redeeming the mortgage within three years allowed by the Limitation Act, and if he neglects to do so he is precluded for ever, even though the decree itself does not provide for foreclosure on non-payment. 13 B. 567; 68 P.R. 1913; 10 C.L.J. 115; 1 I.O. 71; 16 B. 246. But if successive applications are made under Cl. (5) the decree can be executed under Art. 182 after the lapse of three years from the date of the decree, by payment of the mortgage money even after that period. 14 B. 480; 23 B. 592; 10 I.O. 187. An application by the mortgagor to deposit the mortgage money after the decree nisi, but before the final decree is passed is not governed by Art. 182. 25 I.O. 752=17 C.O. 347. A decree entitling the decree-holder to obtain possession of the property on payment of a certain sum in any Jeth may be executed at any time within 3 years after the payment is made. 17 A.L.J. 841=51 I.O. 576. An application under O. 34, r. 5, (2) for the passing of a final decree for foreclosure is not an application for execution of a decree. 38 C. 913; 30 I.O. 494; 29 I.O. 237; 42 C. 776; 27 A. 501 F.B.; 24 A. 542; 9 Bom. L.R. 29; 17 M.L.T. 424; 37 I.O. 802. An application under O. 34, r. 6 for execution of a personal decree is for execution; hence Art. 182 applies. 25 M. 244 F.B.; 3 C.L.J. 291; 32 I.O. 744. An application for a final decree for redemption under O. 34, r. 8. is not one in execution and there is no limitation prescribed for such an application. 22 I.O. 283; 5 C.L.J. 289; 9 I.C. 937.

Decrees of foreign Courts.—The period of limitation for execution of a Native State decree in British India is governed by the law of British India under Art. 182. 14 C. 570; 40 B. 504.

Application for Restitution under S. 144, C.P. Code.—An application for restitution under S. 144, C.P. Code, is governed by Art. 182. 20 M. 448; 8 A. 545; 24 C.L.J. 467; 13 I.O. 179 (M.); 40 P.R. 1913; 67 P.R. 1918; 72 I.C. 912=(1923) Pat. 1.

A contrary view is that it is governed by Art. 181. 15 Bom. L.R. 15; 30 I.O. 680=8 Bur. L.T. 165.

An order for costs is governed by Art. 192. 6 C. 201; 5 B.L.R. 164; 3 W.R. 21; 11 W.R. 67. Although there may be several orders awarding costs, yet if they are

made in the same suit and in the same proceeding they must be deemed to be incorporated with and to form part of the final decree even though the prior orders awarding costs are of an interlocutory character. 39 I.C. 888=2 Pat. L.W. 62.

An application by the decree-holder to withdraw money deposited as security by the judgment-debtor may be made at any time. There is no period of limitation provided for such an application. 21 C. 6.

Orders in execution.—If an order in the course of execution proceedings is capable of execution, an application may be made to execute it within the period allowed by Art. 182. 2 M. 174; 25 M. 431 F.B.

An application for payment of sale proceeds is not under art. 182 or 181; it may be made at any time. 10 C.W.N. 354; 11 A. 29 F.B.; 103 P.R. 1908 F.B.

An application for payment of attached money which is not realised is governed by Art. 181. 10 C.W.N. 354; 24 M. 188.

An application for certification of payment or adjustment.—An application to certify payment or adjustment by the decree-holder can be made at any time. 103 P.R. 1908. But it cannot be made after the decree is time-barred for execution. 12 A.L.J. 825.

Refund for excess money.—An application by the judgment-debtor for refund of excess money realised by the decree-holder in execution is governed by Art. 181. 14 A.L.J. 401; 24 C.L.J. 467; 7 A. 371; 28 C. 113; 10 M. 66; 16 I.C. 238; 30 A. 476; 15 B.L.R. 10; 27 A. 485.

Restoration of property wrongly taken in execution.—An application by the judgment-debtor for restoration of property wrongly taken in execution is governed by Art. 181. 20 I.C. 438; 14 A.L.J. 401; 30 I.C. 680=8 Bur. L.T. 165.

STARTING POINT OF LIMITATION.

CLAUSE (1).—DATE OF THE DECREE OR ORDER.—Time begins to run from the date of pronouncing judgment and not when the decree is prepared and signed. 20 C.W.N. 950; 34 I.C. 504; 3 C.L.J. 291; 57 I.C. 531=5 Pat. L.J. 490. When a portion only of the amount of the decree is left to be ascertained in future, limitation for execution of the whole decree runs from the date of ascertainment. 36 M. 104.

Decree capable of execution at the date.—This clause applies when the decree is capable of execution at the date of the decree, otherwise this clause does not apply. 24 A. 542; 17 A. 39; 28 M. 780; 65 P.R. 1897 F.B. A decree directing a defendant to deliver possession to plaintiff on payment of a certain sum for improvements is a decree capable of execution at the date of the decree and comes within this clause. 20 M.L.J. 36; 10 I.C. 187; 43 B. 689; 17 I.C. 759=23 M.L.J. 576. A decree against Government or a public officer is not capable of immediate execution and the case does not fall under Art. 182, Cl. (1). The period of limitation starts after the expiry of three months mentioned in S. 82, C. P. Code. 26 M. 780. When a decree could not be executed till the judgment-debtor got a certain estate in his possession, the period of limitation was three years under Art. 181 from the time when he had a right to possess the property. 59 I.C. 636 P.C.; 18 C.W.N. 264. If an *ex parte* decree is set aside, and then the original decree is upheld, the time runs from the date of the latter decree. 35 I.C. 110; 33 A. 264 P.C.

CLAUSE (2).—WHEN THERE HAS BEEN AN APPEAL THE STARTING POINT OF LIMITATION IS THE DATE OF THE FINAL DECREE OR ORDER OF THE APPELLATE COURT, OR THE DATE OF WITHDRAWAL OF APPEAL. 30 M. 1 F.B.; 30 A. 385; 3 O.C. 50.

Decree or order of the appellate Court affirming, modifying or reversing the order of the lower Court.—Where the appellate Court passes a decree or makes an order affirming, modifying or reversing the decree or order of the lower Court, the only decree or order capable of execution is that of the appellate Court, and the time begins from the date of the decree or order of the appellate Court. 13 I.C. 140; 4 A. 74; 5 W.R. 6; 2 M.L.J. 261; 6 B.L.R. 52; 10 B.L.R. 101 P.O.; 16 W.R. 1 F.B.; 7 B.L.R. 704 F.B.; 34 C. 874; 22 B. 500; 18 A. 394; 19 B. 258; 39 B. 175; 7 C.L.J. 305; 16 I.C. 945, 970; 40 C. 333; 11 B.H.C. 206; 11 W.R. 329; 3 W.R. 21; 54 P.R. 1908; 33 A. 264 P.O. There are cases in which the appellate Court dismisses the appeal for default of prosecution or rejects it under O. 41, r. 32 without calling the respondent or dismisses it on the ground that no appeal lies or because the appeal is time-barred. In such cases time begins to run from the date of the order of the appellate court dismissing or rejecting the appeal on the ground that Cl. (2) provides for cases "where there has been an appeal," 16 C. 250; 14 W.N. 246; 30 A. 395; 9 C. 100; 7 A. 837; 8 M.L.J. 295; 2 M.L.J. 223; 28 I.C. 367.

Where there has been an appeal.—The word "appeal" does not mean *bona fide* appeal. Even when an appeal is dismissed for non-payment of Court-fees limitation runs from the date of the order of dismissal, 74 I.C. 679.

Appeal from an order rejecting review.—The running of limitation for purposes of execution is not suspended by reason of the pendency of an appeal from an order rejecting review. 1923 C. 288; 68 I.C. 727.

Order as to abatement.—An order of the appellate court to the effect that the appeal has abated is tantamount to an affirmation of the decree. 32 A. 136; 34 C. 874; 1 C.L.J. 17; 30 A. 395 (*contra* in 58 I.C. 977=5 Pat. L.J. 731, the order of abatement does not give a new start of limitation under Cl. (2)).

Order of the Court refusing to set aside the *ex parte* decree.—Cl. (2) does not apply where in the execution of an *ex parte* decree the appeal was preferred from an order refusing to set aside the *ex parte* decree and the appellate court finally rejected the appeal. 2 A. 273; 16 B. 123; 21 C. 387; 44 I.C. 575=2 Pat. L.J. 119 (*contra* in 8 C. 248). The word appeal means an appeal from the decree or order sought to be executed and not an appeal from an order dismissing an application to set aside an *ex parte* decree. 68 I.C. 728=18 N.L.R. 190.

Application for leave to appeal.—Mere application for leave to appeal does not enlarge time. 24 M. 1 P.O.

Withdrawal of appeal.—When the appeal is withdrawn time begins to run from the date of order of the appellate Court effecting such withdrawal. 30 M. 1 F.B.; 30 A. 395; 3 O.C. 50; 21 I.C. 636; 25 M.L.J. 586. Under the old Code the withdrawal of appeal rendered it unnecessary for any decree to be drawn up and the only decree which could be executed was that passed by the original Court. 16 B. 243.

APPEAL FROM PART OF THE DECREE OR ORDER.—Appeal by or against one or more of the parties.—An appeal by or against any one or more of the parties against a part or whole of the decree extends time for the whole decree. 22 B. 500; 18 B. 203; 26 M. 91 F.B.; 23 M. 60; 10 M.L.J. 105; 3 L.W. 521=34 I.C. 791; 32 P.R. 1907; 13 M.L.J. 169; 36 M. 104; 24 M. 1 P.O.; 4 W.N. 138; 5 O.C. 217; 17 A. 103; 33 A. 264 P.O.; 33 I.C. 883=1 Pat. L.W. 309; 32 I.C. 699=2 P. 712; 32 I.C. 699; 10 I.C. 551. The Calcutta and Allahabad decisions give a restricted meaning to the expression and hold that the term appeal in Cl. (2) means an appeal to which the parties to execution proceedings were either parties or came under O. 41, r. 4. 6 C. 194; 19 C.W.N. 283=22 I.C. 685; 14 C. 26; 21 W.R. 243; 6 W.R. 60; 6 C.L.J. 14; 20 C.W.N. 178=31 I.C. 426; 1906 W.N. 55; 31 I.C. 426; 8 A. 573; 6 A. 14; 1926 C. 664=30 C.W.N. 364.

An order returning the appeal to be presented to the proper Court does not extend time under Cl. (2). 43 M. 835. Cl. (2) applies to a case when the application is made for execution of the decree of the primary Court but the period of limitation should be calculated from the date of the final decree of the appellate Court. 16 I.C. 370.

Surety.—A decree on appeal extends the period against the surety of the judgment-debtor against whom the *ex parte* decree was set aside. 44 B. 33.

CLAUSE (3)—WHERE THERE HAS BEEN A REVIEW OF JUDGMENT, LIMITATION RUNS FROM THE DATE OF THE DECISION PASSED ON THE REVIEW.—Order refusing review.—When the review is, after notice to the opposite party refused, the time is not extended. 28 I.C. 367; 6 C. 22; 30 B. 56; 5 W.R. 45; 44 I.C. 575=3 Pat. L.J. 119. The running of limitation for the purposes of execution is not suspended by reason of pendency of an appeal from an order rejecting review. 1923 C. 288; 68 I.C. 727.

No proper review.—When there is no proper review and the Court purports to alter the decree in review, time is not extended. 24 M. 1 P.C.

Partial review.—In case of review time is extended against all the parties even though all were not parties to the proceedings in review. 35 M. 670. If the review is granted in respect of only a part of the decree or order time runs anew for the whole decree or order. 36 M. 104.

Revision from Review.—The date of rejection of review does not give a new starting point of limitation for execution of the decree sought to be revised. 298 P.L.R. 1918=20 I.C. 563; 36 M. 135. Cl. (3) refers to review of decrees and orders of which execution is sought. It does not refer to a review of an order passed in the course of execution proceedings. 1896 W.N. 152.

CLAUSE (4)—WHERE A DECREE HAS BEEN AMENDED, TIME RUNS FROM THE DATE OF AMENDMENT.—This clause was added in the Limitation Act, 1908, to put an end to the conflict of decisions on the meaning of the word "review." Some Courts held that amendment amounted to a review of judgment and others held that it did not. 24 M. 26; 25 C. 258; 4 A. 937; 32 C. 908; 10 C.L.J. 467; 13 I.C. 140; 2 C.W.N. 219; 13 A. 124; 27 A. 575; 4 A.L.J. 469; 25 A. 385.

Order of amendment.—Time runs afresh from the date of the order of amendment and not from the date of actual amendment. 36 I.C. 533=3 Pat. L.W. 447.

Order under section 152.—An amendment under S. 152, O.P. Code, is governed by this clause. 32 I.C. 744.

Amendment *ultra vires*.—If the amendment is made after an application for execution is barred by time, the time is not extended. 32 I.C. 744; 24 M. 1 P.C.; 73 I.C. 461=5 L.L.J. 398. When the decree is amended after its execution is barred by time, time runs afresh from the order of amendment, as it is imported from the literal meaning of the clause. 21 I.C. 615; 10 I.C. 582.

Partial amendment.—Time runs against all the parties, although all were not parties to the amendment proceedings. 35 M. 670; 38 M. 419. An amendment of a part of the decree or order, starts afresh the time for the whole decree or order. 36 M. 104. An amendment in a rent decree consisting merely of a correction in the rate of the rent, the amount of the rent decreed remaining the same, does not give a fresh starting point of limitation. 3 P.L.W. 435=39 I.C. 624. When a decree is incapable of execution until it is amended time runs from the date of amendment under Art. 181 of the Limitation Act. 17 A. 39; 26 M. 780; 18 C.W.N. 266; 21 I.C. 615; 1902 W.N. 50; 5 A.L.J. 403; 1908 W.N. 191; 8 A. 519; 32 I.C. 744.

REVISION.—An appeal does not include revision. An order passed on revision under S. 115, C.P. Code, or S. 25, Provincial Small Cause Courts Act, does not enlarge time under cl. (2). 36 M. 135; 81 P.L.R. 1909; 20 I.O. 563; 12 I.O. 98; 28 I.O. 282. But if the High Court allows the petition on revision the time starts from the order of the High Court as that is the only order capable of execution at the time. 36 M. 135; 12 I.O. 98; 16 B. 550; 44 I.O. 141=22 C.W.N. 158.

CLAUSE (8) AND EXPLANATIONS I AND II.—The requisites under this clause are:—1. An application for execution or to take some step-in-aid of execution of the decree or order must be made. 2. The application must be in accordance with law. 3. The application must be either for execution or to take some step-in-aid of execution. 4. The application must have been made to the proper Court. 5. Limitation runs from the date when the application is made to the Court and not from the date when the Court disposes of the application. 13 O.L.J. 26=9 I.O. 213; 1 A. 580 F.B.; 155 P.L.R. 1912; 30 O. 761; 23 W.R. 282; 5 B. 29; 22 W.R. 546; 25 W.R. 249; 13 I.O. 189; 10 O.L.J. 479; 22 A. 358; 22 B. 722; 36 I.O. 939; 1 C.W.N. 260; 13 O.L.J. 26; 17 O.L.J. 422; 38 M. 695; 2 L. 235 F.B.; 24 W.R. 227; 13 C. 258; 18 I.O. 236; 11 Bom. H.C. 41; 31 I.O. 293; 6 W.R. 63; 1901 W.N. 42; 28 I.O. 381; 11 Bom. L.R. 729; 6 W.R. 34; 8 M.L.T. 235; 8 O. 51 P.O.

AN APPLICATION FOR EXECUTION OR TO TAKE SOME STEP-IN-AID OF EXECUTION OF THE DECREE MUST BE MADE.—The application may be in writing or it may be oral where the law does not require it to be in writing. 19 B. 261; 24 A. 358; 52 I.O. 656; 15 B. 405; 2 W.N. 169; 22 B. 722; 25 B. 639 F.B.; 55 I.O. 116; 3 A. 139; 38 M. 695; 18 I.O. 236 (L.); 22 B. 340; 38 I.O. 540; 31 M. 251; 23 I.O. 533=26 M.L.J. 435; 18 P.L.R. 1912=18 I.O. 236; 67 I.C. 899. An application may be regarded to be made when the order made in execution is of such a nature that the Court would not have made it except upon an application for the purpose. 19 B. 26; 19 I.O. 394; 22 B. 122; 25 B. 639 F.B.; 155 P.L.R. 1912; 20 P.W.R. 1913; 18 I.O. 236; 19 I.O. 304; 52 I.O. 656=12 Bur. L.T. 113. The fact that the decree-holder or his legal adviser was present in Court when the order for issue of process was passed and pressed the Court to issue the process does not amount to an application under this clause. 3 C. 235 F.B.; 25 B. 639 F.B.; 14 O.C. 124; 2 M. 1; 28 I.C. 381; 17 W.R. 355; 3 I.O. 771; 11 Bom. L.R. 729; 7 I.C. 759; (1914) M.W.N. 42. A mere payment into Court of process fee is not sufficient unless it is accompanied by an application or an application is presumed to be made. 28 M. 399; 30 A. 179; 22 A. 358; 23 O. 196; 23 O. 374; 22 B. 722; 25 B. 639 F.B.; 20 B. 179; 13 I.C. 189; 9 C. 644; 9 C. 730; 17 O.L.J. 422; 1901 W.N. 42; 11 Bom. L.R. 729; 3 I.O. 771; 7 I.C. 759; 3 C. 235 F.B.; 13 M.L.J. 93; 14 O.C. 124; 14 W.R. 112; 10 M.L.J. 329; 31 B. 331; 19 I.O. 394=15 Bom. L.R. 205. See 18 I.C. 455; 5 C. 804. Mere appearance by the decree-holder to oppose the judgment-debtor's objection is not sufficient to save limitation. 16 C. 747; 5 I.O. 232; 27 P.R. 1888; 13 I.O. 189. In case of successive applications time runs from the last of such applications. 25 M. 431 F.B. In the absence of an application to make an order directing attachment to issue, such an order on the original application for execution does not amount to a step-in-aid of execution. 167 P.R. 1919. When a decree-holder, on an order by the Court to put in evidence, filed a list of his witnesses who were present in Court and intimated to the Court that he was ready to proceed with his case, it was held that the conduct of the decree-holder implied an application to the court to take the evidence which he was prepared to adduce and should be taken to be an application to take some step-in-aid of execution. 22 C.W.N. 1027=44 I.O. 604; 40 I.O. 1005=21 C.W.N. 868. Even when there is no application to enter up partial satisfaction of the decree such an application may be presumed when the order made in execution is of such a nature that the Court would not have made it except on an application for that purpose. 12 Bur. L.T. 113=52 I.O. 656.

APPLICATION IN ACCORDANCE WITH LAW.—The application in accordance with law required by art. 182 refers to the procedure and form of the application and not with the validity or otherwise of the application on the merits. The decision of the Courts on the merits cannot affect the application for the purposes of the question whether it is by itself in accordance with law, provided the requirements and the substance of the C.P. Code or any other law relating to execution are complied with. What the Court has to see for the purposes of limitation is whether the application itself, whatever its merits on the evidence, is an application made in due conformity with the requirements of the law relating to execution. 37 B. 42. The application must be in accordance with law relating to the execution of decrees. 37 B. 42 ; 22 B. 83 ; 20 C. 388 ; 11 C.L.J. 83 ; 1 N.L.R. 61 ; 13 A. 211 ; 125 P.L.R. 1908.

The application need not be successful.—An application that is struck off dismissed, disallowed, abandoned, or withdrawn may be in accordance with law if it is otherwise valid and in order. 34 B. 189, 12 Bom. L.R. 13 ; 11 B. 467 ; 24 C. 778 ; 13 A. 343 ; 34 B. 68 ; 11 Bom. L.R. 1281 ; 16 M. 452 ; 24 W.R. 459 ; 22 P.R. 1905 ; 10 B. 62 ; 25 W.R. 106 ; 15 C.W.N. 171 ; 17 A. 106 P.O. ; 37 B. 42 ; 8 M.L.T. 235 ; 9 S.L.R. 171 ; 16 A. 26 ; 2 M.L.J. 83.

A time-barred application.—An application that is time-barred is not in accordance with law. 8 C.L.R. 335 ; 22 B. 83 ; 5 C. 894 ; 11 Bom. L.R. 1281 ; 27 C. 210 ; 27 B. 4 F.B. ; 155 P.L.R. 1912 ; 20 B. 175, 35 I.C. 110. But when the judgment-debtor is estopped from pleading the invalidity of the prior application, time may run afresh from the date of such application. 10 W.N. 22 ; 35 I.C. 110 ; 34 I.C. 955 ; 33 M. 11. An application which does not show whether it is within time or not is defective. 65 I.C. 64 = 15 S.L.R. 156.

Relief.—An application which seeks relief which the Court has no power to grant is not valid. 12 A. 64 ; 27 A. 619 ; 4 A. 34 ; 125 P.L.R. 1908 ; 13 C.W.N. 533 ; 13 B. 237 ; 30 I.C. 707 ; 5 I.C. 480 ; 98 P.R. 1901 ; 43 I.C. 537, *contra* in 35 I.C. 614 (M.). If the application asks for relief granted by the decree, it is not invalid, if the Court thought fit to refuse the relief under the circumstances. 37 B. 42 ; 14 Bom. L.R. 861. The relief sought in the previous application need not be the same as in the subsequent application. 2 B. 294 ; 33 A. 279. An application asking for a superfluous relief as well is not invalid. 10 W.N. 245. An application which omits to state the mode in which the assistance of the Court is required is not in accordance with law as an application for execution. 9 C.P.L.R. 15 ; 23 P.R. 1883. But it may serve as a step-in-aid if it asks for issue of notice to the judgment-debtor or if it asks for bringing the representative of the deceased judgment-debtor on the record. 35 I.C. 614 ; 5 B. 246 ; 19 B. 261 ; 23 P.R. 1883. An application for execution by re-arrest of the judgment-debtor who can be re-arrested according to law is in accordance with law and saves limitation. 26 B. 952 ; 33 A. 279. An application to have the judgment-debtor arrested in execution of a decree which was in contravention of the terms of S. 58, C.P. Code, is not an application in accordance with law. 12 A. 64.

Bona fides of the applicant.—The application to be in accordance with law need not be *bona fides* to obtain the fruit of the decree. 23 P.R. 1883 ; 23 W.R. 327 ; 22 W.R. 154 ; 612 F.B. ; 10 W.R. 77 ; 11 W.N. 148 ; 6 W.R. 37 ; 8 C. 51 P.C. ; 22 W.R. 484 ; 3 C. 518 ; 14 W.R. 21 P.C. ; 18 W.R. 76 P.C. ; 21 W.R. 97 P.C. ; 21 W.R. 309 ; 3 Ind. Jur. 208 ; 2 M. 1 ; 3 W.R. 2 ; 2 A. 792 P.C. ; 9 W.R. 443 ; 7 B. 459 ; 11 Bom. L.R. 116 ; 41 P.R. 1884 ; 7 B. 459 ; 26 M. 780 ; 3 C. 235 F.B. ; 5 M. 141 ; 65 P.R. 1897 F.B.

Provisions of O. 21, r. 11, C.P. Code.—An application for execution that is defective and does not comply with the provisions of O. 21, rr. 11-14, C.P. Code, is not in accordance with law. O. 21, r. 17 (2). When a Court rejects an application under O. 21, r. 17, C.P. Code, the application is not in accordance with law. 37 I.C. 916 = 21 C.W.N. 835 ; 44 I.C. 220.

Costs.—Failure to state the amount of costs under sub-heading (h) of O. 21, r. 11 is not a serious defect and the application for execution is in accordance with law and sufficient to save limitation. 47 I.O. 993—5 Pat. L.W. 205.

Amount of the decree and costs.—An execution application which does not contain particulars as to the amount of the decree and costs awarded is not in accordance with law and is not a step-in-aid of execution. 65 I.O. 120; 23 O. 217; 18 C.L.J. 538.

Interest.—An application omitting to state the interest due is defective. (1911) 2 M.W.N. 181.

Inventory of property.—An application without inventory of property or without description of property required by law is defective. 10 W.N. 22; 12 W.N. 3; 1892 W.N. 114; 37 A. 527; 15 A. 84 F.B.; A.W.N. (1892) 72 (*contra* held in 37 B. 72; 34 I.O. 955 (L.); 33 M. 10). Omission to attach an inventory still makes it in accordance with law. Omission to verify the inventory is a mere irregularity and does not vitiate the application. 28 A. 244.

Application without copy of the decree.—An application put in without a copy of the decree as required by the rules of the Court is valid, even though it is dismissed on that ground to save limitation. 28 M. 557; 31 B. 162; 37 B. 42; 32 B. 14 F.B.; 11 M. 336; 11 C.L.J. 243; 40 A. 29.

Non-certification of payment.—An application which omits to mention an uncertified payment towards the decree out of Court, is notwithstanding an application in accordance with law. 10 L.W. 66—51 I.O. 114.

Date of the decree.—A mistake in entering the date of the decree in an application for execution is not a material defect so as to vitiate proceedings. 4 Pat. L.J. 213—48 I.O. 245. Non-compliance with certain formalities of the presentation of a certain execution petition, although they may disable the petitioner from successfully carrying on execution through the agency of such an application, would none the less make the application presented by him an application in accordance with law, for the purposes of limitation. 15 M.L.T. 337—23 I.O. 99.

Conciliator's certificate.—An application for execution without the conciliator's certificate required by S. 47 of the Deccan Agriculturists' Relief Act is in accordance with law. 17 Bom. L.R. 203—28 I.O. 493.

Description of property.—An application for attachment defective on account of absence of description of property is not in accordance with law, and a subsequent application made after more than 3 years from the date of the decree is time barred. 11 I.O. 77.

Attachment of a stranger's property.—An application to attach property which is *bona fide* believed to belong to the judgment-debtor is in accordance with law. 6 P.R. 1835.

Date of disposal of application.—Where there had been two prior applications for execution but the date of disposal of first alone was stated but not that of the second and the number of the execution case was stated with regard to both the applications, such an omission to state the date of disposal of the second application was not a material defect. 71 I.O. 1054.

An application under O. 21, r. 15 (1) though defective saves limitation. 1922 P. 597.

Amended application.—An execution application which is defective in some immaterial respects and is returned for amendment, but is not amended within the time fixed, saves limitation under cl. 5. 6 M. 250; 13 B. 237; 16 M. 142; 35 I.O. 376; 17 M. 67; 14 C.W.N. 481—5 I.O. 579; 27 I.O. 811; 32 I.O. 816;

(1915) M. W. N. 865; 29 I. O. 16; 26 I. O. 413; 28 M. L. J. 494; 29 I. O. 479; 25 O. 494 F.B.; 12 W.N. 114; 23 A. 162; 11 W.N. 154; 12 C.L.R. 279; 1 I. O. 240=5 N. L.R. 8; 40 P.R. 1898; 37 B. 42; 23 P.R. 1883; 3 S.L.R. 171; 18 W.R. 254; 4 O.O. 333; 12 B. 427; 37 O. 399; see 116 P.R. 1907 and 34 I. O. 955; 31 M. 68; 15 M.L.T. 337; 3 O.L.J. 44; 14 M.L.T. 530; A.W.N. (1892) 114; 32 I. O. 691; 74 I. O. 174=4 Pat.L.T. 513. When an application for execution is returned for want of necessary certificate under O. 21, r. 14 to be supplied, it saves limitation although the application is not refiled. 14 O.W.N. 481. If the application is not in accordance with law the decree-holder cannot cure the defect by putting in an amended application after limitation has expired. 4 A. 72; (1911) 2 M.W.N. 181; 116 P.R. 1907. If the application is not in accordance with law and the application after return for amendment is not presented within the time fixed, the application is not in accordance with law. 23 C. 217; 116 P.R. 1907; 18 C.L.J. 538; 26 M. 101; (1911) 2 M.W.N. 181; 37 O. 399; 13 M.L.J. 244; 28 M.L.J. 494=29 I. O. 16; 26 I. O. 413; 31 M.L.J. 561; 40 M. 949; 27 I. O. 811. An application for execution of a decree rejected by a Court under O. 21, r. 17 as not being in accordance with law will not operate to save limitation. 21 O.W.N. 835=37 I. O. 916. An execution application which is presented but returned for amendment and not re-presented within the time limited is sufficient to save limitation in so far as the subsequent application is concerned. 32 I. O. 691=(1915) M.W.N. 865.

Conditions in the decree.—An application by the decree-holder without fulfilling the conditions precedent directed by the decree is nevertheless in accordance with law, as it is open to the Court to order execution conditional on previous compliance with the terms of the decree; even if the Court dismisses the application on this ground it is in accordance with law. 34 B. 189; 31 M. 77; 30 M. 28; 8 A.L.J. 1151. An application for withdrawal of the money without fulfilling the conditions imposed by the decree is not an application in accordance with law. 12 A. 64; 2 A.L.J. 376; 8 A.L.J. 1151=12 I. O. 734.

Application on improper paper.—An application written on improper paper is nevertheless in accordance with law. 3 S.L.R. 171.

Improper stamp.—An application though insufficiently stamped is valid to save limitation. 6 M. 181; 11 I. O. 73. Non-payment of the Court-fees payable on the interest accrued due from the date of the suit to the date of the decree (if any leviable) cannot invalidate an application for execution properly stamped and containing the particulars required by the provisions of O. 21, rr. 11 to 14, C.P. Code. 2 P. 809=74 I. O. 174.

Application against insolvent.—If the application is not competent by reason of insolvency, it is not in accordance with law. 28 A. 387; 30 O. 407.

Person applying for execution.—An application for execution of the decree under attachment is valid whether it is made by the decree-holder of the attached decree or by the attaching creditor. 22 M. L. J. 146=13 I. O. 179; 24 O. 778; 13 M.L.J. 10. But see 21 M. L. J. 577; 35 M. 612. An application by a person not entitled to apply is not in accordance with law. 24 W. R. 10; 7 B. 552; 22 B. 998; 7 A. 898; 11 Bom. L. R. 1281; 13 O. W. N. 533; 23 A. 455; 37 B. 42; 37 O. 399; 13 Bom. L. R. 22; 18 I. O. 97; 3 S.L.R. 171; 13 I. O. 78; 16 I. O. 807. An application by a person *ex-facie* entitled to execute it is in accordance with law and saves limitation. 43 M. 444. An application by the judgment-debtor is not such an application to save limitation. 12 A. 404. An application by the decree-holder who had previously assigned the decree saves limitation in favour of the assignee. 16 O.O. 70; 15 O.W.N. 71; 18 I. O. 97.

Benamidar.—An application by the benamidar of the decree-holder is not one in accordance with law. 9 C. 633; 18 O.W.N. 184; 16 C. 355; 25 I. O. 555; (*contra* held in 37 A. 414).

Transferee.—When the decree is transferred really or nominally and the ostensible transferee applies for execution with the Court's permission the application is in accordance with law. 20 O. 388; 11 C.L.J. 83; 14 B.L.R. 425; 24 W. R. 10; 19 W. R. 255; 4 B.L.R. 40; 6 M.L.J. 31. Even when the assignment in writing is produced later on in the execution proceedings it is in accordance with law. 9 I.O. 349=13 Bom. L.R. 22. Where some of the decree-holders in a suit assigned the decree in favour of one of them and the others having refused to join the assignee, he applied for execution making them defendants, the application was one in accordance with law. 5 I.O. 120. When the application to execute the decree by the assignee of a decree was dismissed on the ground that leave was not obtained for the assignment, a fresh application was barred as the prior application was not shown to have been made by a person entitled to make it. 39 I.O. 950=6 L.W. 19. An application by a transferee of the decree, praying to be recognised as a transferee and on being so recognised he will apply for execution is sufficient to save limitation. 31 M. 234; 5 C.L.R. 253; 13 A. 89; 30 M. 541; 29 A. 301; 10 W.N. 245; 6 P.L.R. 1910; 18 M.L.J. 24; 6 M.L.J. 31. In 151 P.R. 1882 it was held that such an application for substitution was governed by Art. 181. Dismissal of an application for execution of a decree by an oral assignee cannot have the effect of extending time even if the assignment is obtained in writing after the expiry of time 10 M.L.T. 532=13 I.O. 78; 16 I.O. 807; 9 I.O. 349.

Representative of the deceased decree-holder.—An application by the representative of the deceased decree-holder is in accordance with law although the representative is not formally brought on the record. 5 Ind. Jur. 411; 31 M. 77; 20 O. 755; 13 M.L.J. 566 (*contra* in 11 O. 227). An application for execution by the widow of a deceased decree-holder will not enure for the benefit of the adopted son when the widow disputes the adoption. The widow cannot be treated as the representative of the adopted son to the prejudice of the judgment-debtor. 37 I.O. 750=4 L. W. 291.

Application by a pleader.—An application by a vakil is valid although it does not mention the name of the vakil or is not dated. 26 M. 197; 37 O. 399; 11 Bom. L. R. 1281. When there is already on the file a vakalatnama in favour of the vakil under which he filed an application for execution, a further application without such a power is in accordance with law. 42 I.O. 802=(1917) Pat. 100. An application by a pleader after his client's death is not valid. 7 A. 564. An application by a pleader of two decree-holders one of whom was dead at the date of application is valid if it was made through ignorance of the death. 13 C.L.R. 18. A defective power of attorney if not objected to, serves to save limitation. 10 P.R. 1882; 118 P.R. 1918; 37 O. 399.

Absence of succession certificate.—Absence of succession certificate does not bar extension of time. 20 B. 76; 20 O. 755; 13 C.W.N. 533; 6 M. H.O. 131; 16 A. 26; 54 P.R. 1893; 27 P.R. 1894; 3 M.L.J. 326; 9 I.O. 800; 13 Bom. L.R. 22; 13 I.C. 78; 16 I.O. 807.

Absence of probate.—An application by executor who has not taken out probate is valid. 9 C.L.J. 382; 13 C.W.N. 20.

Application against the judgment-debtor who is dead.—When the legal representative of the judgment-debtor is not brought on the record, the application for execution is not in accordance with law. 19 A. 337; 36 A. 482; 3 I.O. 817; 7 M.L.J. 340; 13 M.L.J. 37; 23 W.R. 160 (*contra* in 35 O. 1047; 17 M. 76—held that an execution application against the deceased judgment-debtor saves limitation if it was made owing to a *bona fide* error.) An application for execution against two judgment-debtors one of whom was dead at the time, saves limitation against the living judgment-debtor and the legal representative of the deceased judgment-debtor. 1922 N. 112=

66 I.C. 176. An application against a wrong representative of the deceased judgment-debtor does not save limitation. 32 A. 404. An application against certain persons as legal representatives of a deceased judgment-debtor is in accordance with law, though it turns out subsequently that none of such persons is the legal representative. A.W.N. (1892) 241. An application against the judgment-debtor whose whereabouts are unknown is still an application in accordance with law. 36 A. 482.

Minor judgment-debtor.—Where in an application for execution of a decree against several persons one of whom was a minor and whose guardian was another defendant, the guardian and the minor were not represented as such the application was held to be in accordance with law. 43 I.C. 519. An application for execution made against a minor judgment-debtor represented by his mother, without any application to the Court for an order appointing the other guardian *ad litem* of the minor is in accordance with law and operated to save limitation. 4 Pat. L.J. 35=48 I.C. 415.

Insolvent judgment-debtor.—An application for execution taken out against a discharged insolvent judgment-debtor is not one in accordance with law and as such is not a step-in-aid of execution. 25 Bom. L.R. 1237.

Subsequent default in a valid application.—A valid application in accordance with law cannot be invalidated by any subsequent act of default of the decree-holder, such as the non-payment of the process fee. 55 I.C. 231=31 C.L.J. 389.

Presumption with regard to foreign decrees.—Where a decree is transferred from a foreign Court to a British Indian Court for execution, all proceedings taken in the Court which passes the decree must be regarded as having been taken in a proper Court within art. 182 (5). 45 B. 453.

Application to execute part of the decree.—An application to execute a part of the decree is defective and cannot keep alive the decree. 1 A. 231; 3 M. 79; 4 A. 72. See 7 A. 282 (a case in which no objection was taken). 5 A. 27. (*contra* in 15 W.R. 449; 16 W.R. 29; 16 W.R. 267; 25 W.R. 70 where it is held that if it is made *bona fides* under a misapprehension of law it saves limitation). An application for execution of a part of an indivisible decree saves limitation as regards the whole of it. 26 C. 888; 8 C.W.N. 95; 8 W.R. 274; 11 C.L.J. 83; 18 C. 515; 15 B. 245; 36 M. 104. When a decree for arrears of rent was passed specifying the sums due in respect of each of three tenancies, an application for execution of one of the parts did not save limitation against the others. 36 I.C. 398=22 C.W.N. 192.

Mention of cross-decrees.—Omission to mention the existence of cross-decrees may be a material defect. 71 I.C. 1054.

3. STEPS IN-AID OF EXECUTION.—It is not what the decree-holder does that is to be a step-in-aid, but what he asks the Court to do and the date from which the period of limitation starts is the date on which he asks for that step to be taken. 65 I.C. 681=18 N.L.R. 623. Time begins to run from the date of presentation of an application to take a step-in-aid of execution, and not from the date when the Court actually takes the step. 13 A.L.J. 305; 28 I.C. 381.

Application for sale.—An application to sell property already attached is a step-in-aid. 17 C. 53; 23 C. 156; 15 B. 405; 106 P.R. 1894; 37 M. 231; 9 C. 446; 155 P.L.R. 1912; 38 I.C. 152. (*contra* in 7 C.L.R. 424). An application to sell property subject to a mortgage is a step-in-aid. 15 C. 363. An application to continue a sale is a step-in-aid. 16 M.L.T. 103=25 I.C. 58; 30 C. 761; 55 I.C. 116. When an execution sale is adjourned, an application to fix another date for sale or for issue of sale proclamation is a step-in-aid. 3 A. 139; 2 W.N. 169. When an execution sale is set aside, a fresh application for sale is a step-in-aid. 2 Pat. L.J. 115.

The order in which properties to be sold.—Decree-holder's opposition to the sale of the property of the judgment-debtor in an order different from that in which it has already been directed to be sold is not a step-in-aid. 30 O. 761. If the decree-holder consents only in part and insists that a portion of the property attached should be sold it is a step-in-aid. 7 M. 306.

An application to issue a sale proclamation under O. 21, r. 66 is a step-in-aid. 10 O. 851 F.B. ; 28 M. 399 ; 9 I.C. 634 ; 3 O.L.J. 240 ; 3 A. 139 ; 3 O. 241 F.B., 2 W.N. 169. An application for issue of a fresh proclamation of sale is a step-in-aid. 9 I.C. 634. An oral application under O. 21, r. 66 by the decree-holder's pleader to have a date fixed for the settlement of the terms of the proclamation under O. 21, r. 66 is a step-in-aid of execution. 2 Pat. L.J. 5=38 I.C. 540.

An application for leave to bid is a step-in-aid. 13 A. 211 ; 22 A. 379 ; 21 B. 331 ; 8 O.O. 161 (*Contra* in 9 O. 730 ; 23 C. 690 ; 88 P.R. 1884 ; 24 O.L.J. 462=37 I.C. 738. It is not a step-in-aid). But according to the latter rulings of the Calcutta and Punjab High Courts also if the application in fact aids execution it may be a step-in-aid. 30 O. 761 ; 10 O.W.N. 209 ; 12 O.W.N. 621. An application for permission to bid at an execution sale in execution of his decree when made after the auction sale has been postponed on account of no purchaser having come forward is a step-in-aid. 60 P.R. 1912.

An application to confirm an execution sale is not a step-in-aid whoever might be the purchaser. 9 O.W.N. 193 ; 31 O. 1011 ; 11 O.L.J. 356 ; 12 O. 441 ; 10 O.L.R. 330 ; 13 W.R. 315 ; 13 W.R. 38 ; 9 W.R. 100 ; 72 I.O. 938=1 Pat. L.R. 6.

An application to set off purchase money by the decree-holder instead of paying into Court is not a step-in-aid. 23 O. 196 (*contra* held in 8 O.O. 161 ; 33 I.C. 557).

Application for attachment.—An application to attach property is a step-in-aid. 105 P.R. 1882. An application to continue attachment is not a step-in-aid. 20 O. 255. An application for attachment of moveables under O. 21, r. 43 is a step in aid. (1925) M.W.N. 591. When, an execution petition being put in, notice was ordered and in the absence of the judgment-debtor on the day fixed the Court passed an order directing attachment, this does not amount to a step-in-aid. 45 M.L.J. 680=(1923) M.W.N. 660.

List of the attached property.—An application for a list of the attached property is not a step-in-aid. 21 M. 400.

Delivery of possession.—An application for possession of purchased property by the decree-holder purchaser is not a step in-aid. 31 A. 82 F.B. ; 69 I.O. 638=1922 P. 310 ; *contra* held in 18 P.R. 1904 ; 24 M. 185 ; 4 O.W.N. 681 ; 9 O.L.J. 67 ; 14 O.W.N. 433 ; 1 I.O. 430 ; 33 I.O. 557. An application by the decree-holder to be put in possession of the property purchased in execution is a step-in-aid. 35 B. 452 ; 18 O.O. 359=33 I.O. 557 ; 48 A. 479 ; 27 O. 709.

Depositing poundage fees.—An application by the decree-holder purchaser depositing poundage fees is not a step-in-aid. 22 O. 827 ; 23 O. 196.

An application for payment of sale proceeds deposited in Court is a step-in-aid. 2 M. 174 ; 6 A. 366 ; 22 B. 310 ; 3 M.L.J. 296 ; 14 M. 452 ; 17 M. 165 ; 2 W.N. 184 ; 19 B. 261 ; 32 I.C. 557 (O.) ; 12 A. 399 F.B. ; 11 O.P.L.R. 161. But if the money is not realised it is not a step-in-aid. 22 M. 448. According to the Calcutta and Punjab rulings such an application is not a step in-aid. 23 O. 196 ; 10 O. 549 ; 8 O. 89 ; 11 O. 227 ; 103 P.R. 1908 F.B. ; 27 P.R. 1888 ; 88 P.R. 1884 ; 107 P.R. 1881 ; 3 O.L.J. 95 ; 190 P.R. 1882 ; 10 O.W.N. 28 ; 32 I.O. 709 (O.) ; 3 O. 233 F.B. ; 155 P.L.R. 1912 ; 30 I.O. 51 (S.). An application for payment of realised money

which is not realised in execution is a step-in-aid. 10 O.W.N. 354 ; 24 M. 188. An application for payment out of money deposited in Court as a condition for setting aside an *ex parte* decree is a step-in-aid. 35 M.L.J. 575=48 I.C. 226.

Payment of money under a pre-emption decree is a step-in-aid of execution. 22 O.C. 82=52 I.C. 156 ; 23 O.W.N. 926=54 I.C. 839.

Rateable distribution of assets.—An application for rateable distribution of assets under S. 73, C. P. Code, is a step-in-aid. 8 O.W.N. 382 ; 17 O.C. 69 ; 1 I.C. 430 ; 10 C.W.N. 28.

Certification of payment.—An application by the decree-holder to certify payment or adjustment in part satisfaction of the decree is a step-in-aid provided the same is actually made. 32 A. 257 ; 34 P.L.R. 1906 ; 26 A. 19 ; 12 A. 399 F.B. ; 9 A. 9 ; 12 O. 608 ; 20 O. 696 ; 10 O.L.J. 467 ; 8 W.N. 23 ; 15 Bom. L.R. 930=38 B. 47 ; 1 O.L.J. 96 ; 34 I.C. 625=20 O.W.N. 615 ; 6 I.C. 43 ; 33 A. 529 ; A.W.N. (1888) 23. An oral application by the decree-holder to record a payment made to him out of Court is a step-in-aid. 67 I.C. 899=1923 N. 11. An application by the decree-holder to certify an adjustment made out of Court is a step-in-aid. 26 A. 19 ; 6 I.C. 43 ; 8 A.L.J. 487 ; 33 A. 529.

Certification under S. 41, C. P. Code.—An application to certify the result under S. 41, C. P. Code, by the decree-holder is a step-in-aid. 6 M. 81.

Guardianship of the minor.—An application for execution in which owing to a *bona fide* mistake the minor judgment-debtor was described under the guardianship of a dead person, constituted a step-in-aid of execution. 72 I.C. 1003=4 Pat. L.T. 54 ; 17 M. 76 ; 35 O. 1047.

Bringing legal representative on the record.—An application to substitute a legal representative of the deceased decree-holder or judgment-debtor on the record is a step-in-aid. 30 M. 541 ; 24 O. 778 ; 14 M.L.T. 530 ; 2 O.L.J. 544 ; 6 P.L.R. 1910 ; 13 O.W.N. 20 ; 17 M.L.J. 485. An application to bring on record the legal representative of a deceased judgment-debtor and for issue of notice under O. 21, r. 22 is a step-in-aid even though it did not state the date of prior application, the amount of costs or the way in which the Court's assistance was required. 65 I.C. 571=35 C.L.J. 82 ; or even though the decree-holder asked for relief to which he was not entitled. 26 M.L.J. 83=21 I.C. 782 ; 30 M. 541 ; 31 M. 68 ; 27 A. 619 ; 17 M.L.J. 475. An application by the legal representative of the decree-holder to be brought on the record is a step-in-aid. 9 O.C. 281 ; 17 M.L.J. 475.

Application for succession certificate.—An application for succession certificate by the representative of the deceased decree-holder is not a step-in-aid. 37 B. 559.

Application for copy of the decree.—An application for obtaining a copy of the decree for filing it with the execution application is not a step-in-aid. 11 M. 336 ; 11 O. 227 ; 60 I.C. 117=39 M.L.J. 572.

Application for extracts from Collector's register.—An application to the Collector for extracts from Collector's register required to be filed under O. 21, r. 14, is a step-in-aid. 14 O.W.N. 481 ; 5 M. 141 ; 14 Bom. L.R. 1204.

Amendment of the decree.—An application to amend the decree or bring it into conformity with the judgment is not a step-in-aid of execution. 25 C. 258 ; 13 A. 124 ; 20 A. 304 ; 27 A. 575 ; 2 O.W.N. 219 ; 17 A. 39 ; 4 A.L.J. 469 ; 1907 W.N. 169 ; 8 M.L.J. 434.

Application re-presented after amendment.—Where an execution application is returned for amendment, and subsequently re-presented with the necessary amendments effected the starting point for the purpose of computing limitation for a

subsequent application for execution is the date of presentation of the original application and not the date on which it was presented after amendment under O. 21, r. 17, C. P. Code. 52 I.O. 765=10 L.W. 222.

Transfer and re-call of the decree.—An application for transfer of the decree to another Court for execution is a step-in-aid. 30 M. 537 ; 2 O.W.N. 415 ; 55 P.R. 1904 ; 22 O. 375 ; 2 A. 284 ; 2 A. 525 ; 35 A. 389 ; 51 P.R. 1876 ; 6 C. 513 ; 20 O. 29 ; 12 A.L.J. 1006 ; 33 I.O. 523 ; 27 P.L.R. 1905 ; 9 I.O. 246 ; 32 I.O. 1005 ; 1 A. 525 ; 19 I.C. 664=11 A.L.J. 533 ; 18 I.O. 97=16 O.O. 70 ; 16 O. 744 ; 22 O. 921. An application to transfer to another Court a decree for execution though not accompanied by a certified copy of the decree and though the decree is not transferred, is a step-in-aid of execution. 42 I.C. 100=11 Bar. L.T. 116. An application for transfer of the decree (already transferred) to the Court that passed the decree is not a step-in-aid. 24 Bom. L.R. 798=68 I.O. 506. When after an application for the transmission of a decree and order thereon the decree-holder who has not filed the necessary copies under O. 21, r. 6 filed them into Court and orally applied again for the transmission of the decree, the latter was not a step-in-aid. 58 I.O. 536=12 L.W. 9 ; An application to transfer the decree to a foreign Court for execution is not a step-in-aid. 107 P.R. 1881 ; 40 M. 1069 F.B. An application to a Court in a Native state to transmit the decree to a British Indian Court for execution is a step-in-aid. 69 I.O. 932=1923 M. 72. A subsequent application after transfer order, bringing in the stamp for transmission of the record is a step-in-aid. 7 M. 307. An application for a certificate of transfer for execution to another Court is a step-in-aid. 65 I.O. 932=3 Pat. L.T. 298. An application to transfer a decree for execution is a step-in-aid of execution if it is in accordance with law. 3 Pat. L.T. 422=67 I.O. 598. An application by the decree-holder to a Court executing a transferred decree to return the decree to the Court that passed it is a step-in-aid. 6 M. 81 ; But see 22 O. 827. But an application to return the decree to him is not a step-in-aid. 11 O. 227 ; 23 B. 311 ; 12 O. 441 ; 22 O. 823 ; 3 C.L.J. 94. An application to the Court to re-call the case sent to another Court for execution is a step-in-aid. 22 T.L.R. 83. When a decree is transferred to another Court an application to the Court that passed the decree is not a step-in-aid. 39 M. 640 ; 1923 P. 384=74 I.O. 640.

Suit under O. 21, r. 63.—A suit by the decree-holder to establish his judgment-debtor's right under O. 21, r. 63 is not a step-in-aid. 17 O. 267. A plaint in a suit by the decree-holder for a declaration that the transfer of the property to another person by the judgment-debtor is fraudulent, against the judgment-debtor and the transferee in the Court which passed the decree and was bound to execute it, is a step-in-aid. 9 O.L.R. 444 ; 4 U.P.L.R. (O.) 97 ; 22 A. 358 ; 25 B. 639 ; 30 A. 179 ; 35 B. 452 ; 32 M. 425 ; 19 A.L.J. 905 ; 26 O.C. 71=69 I.O. 660. A plaint in a suit by the decree-holder under S. 53, T.P. Act, to set aside a deed of settlement by the judgment-debtor does not operate as a step-in-aid, especially when the properties sought to be attached are different from those which formed the subject-matter of the suit. 45 M. 466.

Amendment of application.—Re-submission of an application amended by order of the Court is not a step-in-aid. 5 M.L.T. 224. If a decree-holder files a defective application and is ordered to amend it, he gains profit by the amendment, on the ground that it is a step-in-aid of execution. 167 P.R. 1919.

Application for execution.—An application that a previous application for execution may be disposed off along with an application for execution made in another case is not a step-in-aid. 25 W.R. 94. An application for execution for payment of an instalment is a step-in-aid of execution in respect of all the instalments then due. 46 B. 719. An application by a decree-holder made in accordance with law under O. 21, r. 12, is an application to take some step-in-aid of execution. 33 A. 529 ; 12 A. 399.

Leave to execute.—An application for leave to execute is not a step-in-aid. 10 O.L.J. 479.

Application for leave to appeal.—An application for leave to appeal to the Privy Council is not a step-in-aid. 24 M. 1 P.O.

Application for execution of an order in execution.—An application for execution of an order for costs in execution proceedings does not extend the time for execution of the decree itself. 24 M. 672.

Notice.—An application to issue notice or substituted service of notice, to the judgment-debtor when required is a step-in-aid. 12 A.L.J. 785.

Appointment of a commission.—An application that a commission might be issued to examine the books of a third party is not a step-in-aid. 88 P.R. 1884.

Restoration of execution proceedings.—An application to restore the struck off execution proceedings is a step-in-aid. 27 O. 285 ; 9 W.R. 390.

Appointment of a receiver.—An application to appoint a receiver is a step-in-aid. 19 M.L.J. 39 ; 5 I.C. 758.

Asking for Sheriff's Report.—An application asking that the sheriff should report why the service of attachment has not been effected is a step-in-aid. 18 I.O. 236.

Search warrant.—An application for search warrant is a step-in-aid. 20 O. 580 ; 3 A.L.J. 815.

Asking date of hearing.—An application that the date of hearing be communicated to the decree-holder is not a step-in-aid. 29 P.R. 1885.

Re-construction of a lost decree.—An application to re-construct a lost decree is not a step-in-aid. 11 O.L.J. 243.

Subsistence allowance.—An application to the Court to receive railway charges for taking the judgment-debtor to the civil prison, and subsistence money for his maintenance, while in prison, is a step-in-aid of execution. 15 L.W. 14=1922 M. 30.

Arrest.—An application for arrest of the judgment-debtor is a step-in-aid of the execution by arrest against the judgment-debtor and his surety. L.R. 3 A. 523 ; 20 A.L.J. 726=1922 A. 481.

Reversal of execution proceedings.—An application for reversal of the previous proceedings for execution is a step-in-aid. 64 I.O. 727 ; 27 O. 285.

Withdrawal of execution case.—An application to withdraw a previous application for execution is purely a redundancy and does not facilitate in any way the execution of the decree and so is not a step-in-aid of execution. 50 I.O. 444=(1919) Pat. 80. An application to withdraw or strike off proceedings is not a step-in-aid. 23 C. 817 ; 28 I.O. 381 ; 22 B. 722 ; 16 A. 75.

Appeal.—An appeal to the High Court against an order in an execution case is not an application for execution in accordance with law, to the proper Court, or a step-in-aid of execution. 47 B. 783. An appeal by the decree-holder against the insolvency order is an application to take a step-in-aid. 39 B. 20. The presentation of a second appeal within three years next before the application for execution is not a step-in-aid to save limitation. 74 I.O. 279. The defence of an appeal preferred by the judgment-debtor in an execution proceeding is not a step-in-aid of execution. 48 I.C. 187.

Review.—An application for review is not a step-in-aid. 1890 W.R. 152.

Stay of execution proceedings.—An application by the decree-holder for adjournment of the hearing is not a step-in-aid of execution. 23 O. 817 ; 27 O. 285 ; 1 A. 80 ; 89 P.R. 1894 ; 35 O. 1060 ; 23 I.O. 533 ; 28 I.O. 381 ; 13 A.L.J. 405 (*contra* held in

36 B. 638 ; 37 B. 317. When both the parties apply to the Court to postpone the hearing of a pending execution with a view to arrive at a compromise, the application so made cannot be considered a step-in-aid. It is intended as a step-in-aid, which if successful would avoid the necessity for execution. 25 Bom. L.R. 490—73 I.C. 1011. An application for time to serve the judgment-debtor with notice of application for execution is a step-in-aid. 29 A. 301 ; 10 W.N. 245 ; 35 I.C. 693. A *bona fide* application by the decree-holder praying for extension of time for ascertaining the whereabouts of his judgment-debtor is a step-in-aid. 38 A. 690 ; 50 I.C. 278. An application for adjournment to obtain copies of decree and judgment or of extracts from the Collector's register to be filed under O. 21, r. 14, is a step-in-aid. 14 Bom. L. R. 765 ; 38 M. 695 ; 33 I.C. 79 ; 17 I.O. 969.

Application to postpone sale.—Such an application is not a step-in-aid if it is made only to give time to the judgment-debtor to pay off the decretal amount. 3 A. 757 ; 30 C. 761 ; 3 C.L.J. 250 ; 38 M. 695 ; 16 M.L.T. 103 ; 22 I.C. 709. If such an application was made with a view to bring the property to sale more advantageously it is a step in-aid (*Ibid*). When a decree-holder applied for time to obtain copies and for citing witnesses, but eventually the execution was dismissed for want of prosecution, such an application for time, etc., was not considered to be a step-in-aid of execution. 27 C.W.N. 505—1923 C. 572. If the judgment-debtor applies to postpone an execution sale and the decree-holder merely consents to it, it is not a step-in-aid. 28 M. 40.

Dismissal of objections to execution.—An application asking that certain objections to the execution of the decree be dismissed is a step-in-aid of execution and saves the bar of limitation. 40 A. 668.

Issue of notice.—An application to issue notice to the judgment-debtor to show cause why a decree should not be executed against him is a step-in-aid. 54 I.C. 438. The issue of a notice under O. 21, r. 22 is sufficient to save limitation even though it was made on a defective application. 10 I.C. 411 ; 1922 P. 497. The improper admission of an application for execution of a decree which was time barred and the issue of a notice thereon under O. 21, r. 22, does not revive the decree nor is it a step-in-aid for a second application. 2 A.L.J. 67.

Substituted service of notice.—An application for a substituted service of notice is a step-in-aid. 36 A. 439.

Affidavit.—An affidavit of service of notice under O. 21, r. 22 is not a step-in-aid of execution. 11 Bom. L.R. 729 ; 21 C.W.N. 423—38 I.C. 536 ; 49 I.C. 892.

Application for execution against the surety.—An application asking the court to execute the entire decree by arrest of a surety who made himself liable for the satisfaction of the decree after it was passed, is an application to take some step-in-aid of execution against the original judgment-debtor. 43 A. 152.

Cross-examination of the objector.—The cross-examination of a person who objects to the execution of a decree does not amount to a step-in-aid of execution so as to give a fresh start of limitation. 54 I.C. 643.

Costs of execution.—An application for costs incidental to the execution proceedings is not an application for the execution of the original decree and therefore is not a step-in-aid. 1926 A. 440 ; 26 M. 672.

Person applying.—An application by the intended assignee is not a step-in-aid of execution. 43 C. 990 P.O. An application by the assignee of a decree to have his name substituted is a step-in-aid. 74 I.C. 40—9 O. & A.L.R. 635. An application by the holder of a decree attached in execution is not a step-in-aid. 35 M. 632.

Application by a trespasser.—The question of the right of the trespasser to execute a decree obtained on behalf of an estate depends largely upon the nature of

the decree, and of the objection taken by the judgment-debtor to the proceedings instituted by the trespasser. When a decree is due to an estate, the person who for the time being is recognised as the proprietor of the estate is the proper person to execute the decree and his application to execute the decree is a step-in-aid of execution. 48 I.C. 704. An application by an assignee of the mortgagee decree-holder to be brought on the record and for the issue of notice under O. 21, r. 22 to the judgment-debtor is an application in accordance with law and is a step-in-aid of execution, though there was no application for an order under S. 89, T.P. Act, 2 I.C. 433=8 M.L.T. 232.

Payment of Process-fee is a step-in-aid. 9 C. 644 ; 23 O. 374, 378 ; 18 I.C. 455. The non-payment of a Nazir's fee for the issue of a sale proclamation pursuant to an order of the Court on a previous application for the issue of a sale proclamation does not extend time. 17 O.L.J. 422=13 I.C. 189 ; 20 O.C. 332=43 I.C. 1342=10 I.C. 182=14 O.C. 124. A Batta memorandum which mentions that it is paid for notice to issue under O. 21, r. 22 is a step-in-aid of execution. 19 M.L.T. 146=32 I.C. 484. The payment of *talbana* in compliance with an order of Court is not a step-in-aid. 73 I.C. 211=9 O. & A.L.R. 68.

Summoning of witnesses.—An application for summoning of witnesses is a step-in-aid. 1923 A. 415 ; 19 A.L.J. 843. An application for summons to a patwari for ascertaining the area is a step-in-aid. 74 I.C. 816=9 O. & A.L.R. 465.

Resistance of insolvency.—Decree-holder's resistance to the application for insolvency by the judgment-debtor is not a step-in-aid. 28 A. 387 ; 28 I.C. 381 (*contra* in 16 Bom. L.R. 612).

Application opposing the application of the judgment-debtor.—Decree-holder's opposition to an application under O. 21, r. 2 for certifying payment out of Court by the judgment-debtor is not a step-in-aid. 4 O.W.N. 152. Decree-holder's opposition to the execution of a decree held by the judgment-debtor is not a step-in-aid so as to save limitation in his own decree. 7 A. 898 ; 7 B. 552 ; 5 W.R. 8 ; 22 B. 998. Decree-holder's resistance to an appeal preferred by the judgment-debtor is not a step-in-aid of execution. An application in resistance of judgment-debtor's application for release from attachment of property is a step-in-aid. 5 I.C. 292 ; 5 A. 344 ; 11 C. 55 ; 27 P.R. 1888 ; 5 A. 576 ; 21 O. 23 ; 4 M.L.J. 61.

An application asking the Court to overrule Collector's objections and to give effect to prior execution application is not a step-in-aid. 1 B. 59 ; 2 B. 294.

Execution of the attached decree.—An application for execution of the attached decree is a step-in-aid of execution of the decree in execution of which the former decree was attached. 12 A.L.J. 1006=25 I.C. 738 ; 13 M.L.J. 10 ; 11 Bom. H.O. 206 ; 8 I. C. 675 ; 7 A. 382 ; 24 O. 778.

Steps-in-aid of a decree that is set aside.—An application for execution made after the regular decree is barred by limitation is not kept alive by steps taken in aid of execution on the basis of the *ex parte* decree which was set aside. 103 P.R. 1916.

4. THE APPLICATION MUST BE MADE TO THE PROPER COURT—Proper Court means the court whose duty it is to execute the decree or order. **Explanation II.**—The Court in which the decree-holder brings his suit under O. 21, r. 63 to establish the right of his judgment-debtor is not the proper Court. 17 O. 268. An application though a step-in-aid will not save limitation unless it is also one presented to the proper Court. 35 I.C. 237=31 M.L.J. 90.

When the decree is transferred to another Court.—In such cases the Court to which the decree is transferred is the proper Court. 13 C.W.N. 533 ; 20 A. 129 ; 37 M. 291 ; 39 M. 640 P.O. ; 4 O.C. 933 ; 23 M.L.J. 236. Before the result is certified under

S. 41, the transferring Court is not the proper Court, 2 W.N. 171; 37 M. 231; 39 M. 640 P.O.; 23 M.L.J. 236; 15 I.O. 738. When the Court executing the transferred decree has certified the result of execution under S. 41, C.P. Code, it ceases to be the proper Court, 4 O.C. 333; 11 W.R. 269; 2 A. 796 P.O.; *contra* in 168 P.R. 1888.

When the decree is transferred to the Collector.—When the decree is transferred for execution to the Collector under S. 68, C.P. Code, he is the proper Court, 16 A. 228.

Presumption with respect to foreign decrees.—When a decree passed by a court in a foreign State is transferred to a Court in British India, all proceedings taken in the Court which passed the decree must be regarded as having been taken in a proper Court within Art. 182 (5). 45 B. 453.

Pecuniary jurisdiction.—A decree was passed by a Court having jurisdiction of Rs. 2,000, and the application for execution was made to his successor who was invested with powers of Rs. 1,000, *held* that the application was made to the proper court, 39 I. O. 63=2 Pat. L.J. 113.

Transfer of jurisdiction.—When the decree was passed by Court A, and the property sought to be proceeded against in execution is transferred from Court A to the jurisdiction of Court B, the latter Court alone is the proper Court for execution and an application made to Court A for execution is not in accordance with law so as to save limitation, 42 I.O. 671=(1917) M.W.N. 788; 27 I.O. 225=18 O.W.N. 1288; 37 M. L.J. 127 F.B.

Magistrate.—An application to a Magistrate to restrain the parties from acting contrary to the terms of a decree is not a step-in-aid. 12 M. 356.

CLAUSE (6) (WHEN THE NOTICE NEXT HEREINAFTER MENTIONED HAS BEEN ISSUED) THE DATE OF ISSUE OF NOTICE TO THE PERSON AGAINST WHOM EXECUTION IS APPLIED FOR TO SHOW CAUSE WHY THE DECREE SHOULD NOT BE EXECUTED AGAINST HIM, WHEN THE ISSUE OF SUCH NOTICE IS REQUIRED BY THE CODE OF CIVIL PROCEDURE, 1908.—This clause is applicable when notice is required by law to be given to the judgment-debtor under the C. P. Code. The notice referred to in this clause is the notice given under O. 21, r. 22, under the conditions mentioned therein. 17 Bom. L.R. 203; 36 I.O. 398. A notice under O. 21, r. 16 would not give a fresh start of limitation. 27 A. 575.

Clauses (5) and (6) are not exhaustive.—When an application to save a step-in-aid of execution under clause (5) has been made after issue of notice under cl. (6) the starting point for computing the period of limitation is the date of the application to take a step-in-aid of execution. 52 I.O. 937=12 Bur. L.T. 74. Notice to the person against whom execution is applied for must have been issued. If notice is issued to a wrong party by error and not to the judgment-debtor, it is ineffectual to give a new start against the judgment-debtor. 23 P.R. 1883. When a decree is not joint but several and a notice is issued in respect of a part only of the decree, such an issue of notice does not keep alive the entire decree. 36 I.O. 398. An issue of notice to the judgment-debtor would not save limitation when execution is applied for against the legal representative. Date of issue of notice is the starting point of limitation and not when subsequent proceedings are taken thereon or order for notice is passed. 22 W.R. 546; 24 W.R. 227; 3 Ind. Jur. 208; 54 I.O. 1=24 O.W.N. 55; 40 A. 630; 42 B. 553; 36 I.O. 999; 45 I.O. 203; *contra* in 28 B. 416. Date of issue of notice means the date of the order. The date of issue of notice and not the date of the application is the starting point of limitation. L.R. 4 A. 79 (Rev). Service of notice is not necessary. 27 B. 622; 23 B. 35; 18 W.R. 193; 14 W.N. 96; 20 O.L.J. 15; 8 M.L.T. 295; 10 I.O. 411; 28 B. 416; 15 A. 84 F.B.; 28 I.O. 493; 1892 W.N. 71;

10 W.N. 244 ; 1 A. 675. Service of notice gives no new start of limitation. 20 O.L.J. 15 ; 27 I.C. 225. The date of issue of notice means the date on which the notice was actually issued from the office of the Court, that is to say, the date on which it is signed by the serishtadar in the name of the Court. 45 I.C. 203=3 Pat. L.J. 285. Issue of notice does not revive barred decrees. 22 B. 89 ; 30 I.C. 707 ; 3 I.C. 817 ; 2 M. 1 ; 11 Bom. L.R. 1281. A notice issued on a defective application saves limitation. 15 A. 84 F.B. ; 116 P.R. 1907 ; 1 A. 675 ; 22 P.R. 1905 ; 34 I.C. 280 ; 10 I.C. 411 ; 3 I.C. 817 ; 30 M.L.J. 460 ; 28 I.C. 493 ; 13 O.C. 303 ; 19 O.C. 17 ; 18 M.L.T. 313 ; 39 M. 923 ; 18 M.L.T. 14 ; 16 A.L.J. 344 ; 28 M. 557.

CLAUSE (7) (WHEN THE APPLICATION IS TO ENFORCE ANY PAYMENT WHICH THE DECREE OR ORDER DIRECTS TO BE MADE AT A CERTAIN DATE) SUCH DATE IS THE STARTING POINT OF LIMITATION.—When an order is made under O. 20, r. 11.—When such an order is made for the payment after a certain time or by instalments, the decree to be executed is the decree so modified. 26 P.R. 1894 ; 7 M. 152 ; 12 A. 571 ; 48 P.R. 1880 ; 200 P.R. 1889 ; 89 P.R. 1894 ; 5 P.L.R. 1909 ; 45 P.L.R. 1903 ; 61 P.R. 1886 ; 34 I.C. 393.

Old law.—Under the old law, limitation ran from the date of the decree and not from the date fixed for the payment of the sum mentioned in it. 22 O. 144.

When a certain date is fixed for the payment of money.—"Certain date" includes a date which could be ascertained by reference to a contingent event. It includes also payment after certain periods which are declared by the decree. 14 M. 396 ; 22 P.R. 1905 ; 19 M. 67 ; 159 P.R. 1889. This clause does not apply when the payment is to be made "within 8 years." 5 W.N. 193. A decree directing payment to be made after a fixed period falls under this clause. 45 P.R. 1882. A decree staying execution till the decision of the insolvency petition then pending does not fall under this clause. 30 O. 407. If the decree-holder is to recover the principal sum on default of judgment-debtor in payment of interest year by year, there is no *certain date* for payment of the principal. 99 P.R. 1890. A decree regulating the rate of interest payable thereunder with reference to certain dates is not governed by this clause. 2 W.N. 53. When a decree directs that the mortgaged properties be sold first and if the proceeds are insufficient, the balance be realised by a sale of other properties, it is not a direction to pay money within the meaning of Art. 182, cl. (7). 24 I.C. 35=18 C.W.N. 492.

When instalments are fixed by the decree.—The decree-holder has a right to enforce the payment of each instalment as it falls due within three years from the date when the instalment becomes payable under the decree. 4 Pat. L.J. 365=48 I.C. 328 (21 O. 542, dissented from). When a decree is made payable by instalments and on default being made in the payment of one or more instalments, the decree-holder is given the option of executing the decree in a certain manner, that option must be exercised by him once for all. If he does not exercise the option according to the terms of the decree on the happening of the first default, he cannot revise it subsequently so as to be able to enforce the default clause. 8 P.R. 1917. When the decree compels the decree-holder, on happening of default to take out execution for the entire amount then due, he must apply for execution within three years of the first default. 16 A. 371 ; 100 P.R. 1902 ; 13 O. 73 ; 30 A. 123 ; 31 I.C. 479 ; 38 I.C. 634 ; 37 I.C. 916 ; 6 C.W.N. 348 ; 2 O.C. 74 ; 52 P.R. 1870 ; 38 A. 204 ; 42 B. 728 ; 48 I.C. 728. Limitation runs from the default notwithstanding the fact that the decree-holder had the option to take out execution of the whole decree. 21 O. 542. When a decree payable by instalments contained a proviso that if any one instalment was not duly paid, the decree-holder should be entitled to receive forthwith the whole amount remaining due, held that the decree-holder had the option of taking advantage of any default and was not barred to execute the whole decree within 3 years of the first default. 6 P.R. 1913.

When payments made are not certified time begins to run from the date when the instalment becomes payable. 38 A. 204.

Waiver.—When a default is made in payment of several instalments and the whole sum becomes due as a consequence, realising of subsequent instalments is no proof of waiver of default and the decree-holder can proceed for the whole decree. 25 Bom. L.R. 153—72 I.C. 275.

EXPLANATION I.—This explanation applies to applications mentioned in cl. (5). 38 M. 419.

Application against one of the Judgment debtors.—An application for execution of a decree made against several persons jointly and severally or jointly saves limitation against all if made against any. 8 W.R. 80; 6 W.R. 18; 9 W.R. 240; 2 I.C. 88; 36 M. 106; 11 C.L.R. 83; 4 I.C. 408; 12 B.L.R. 500; 13 O.C. 48; 38 M. 419. Where a joint decree is passed against A and B and execution is applied for against A, but afterwards the decree against A is set aside, the limitation is saved as against B also. 31 A. 309. When a decree is passed against A and B, for mesne profits and against A, B and C for costs of the suit, an application against A for execution for mesne profits saves limitation against C for costs as well. 30 M. 268; 36 M. 104; 11 C.L.J. 83; 10 I.C. 552; 17 M.L.J. 456. A joint judgment-debtor who was not a party to a previous barred application, which was allowed is not precluded from showing that the application was barred, was not in accordance with law and would not affect him. 27 C. 210. If the defendants are liable severally under the decree, execution against one does not save limitation against others. 10 E.L.R. 258 F.B.; 10 B.L.R. 259; 36 I.C. 398; 25 W.R. 310; 3 A. 519; 30 C. 761. When the decree is not joint against all the defendants, execution against one will not save limitation against the others. 6 W.R. Mis. 18; 10 W.R. 30 F.B.; 10 W.R. 10 (*contra* in 8 W.R. 80). Where a decree is passed against all the defendants in one matter and severally against different defendants with respect to other matters the first portion of the *Explanation I* should apply to decrees passed severally and the second portion to the decree or decrees passed jointly. 1926 A. 440. (30 M. 268 dissented from.)

Application by one of the decree-holders.—In a case of a joint decree in favour of more persons than one an application by one keeps alive the decree in favour of all. 6 W.R. 76; 8 W.R. 100; 21 W.R. 243; 11 W.R. 421; 13 W.R. 128; 12 B.L.R. 500; 25 M. 431 F.B.; 22 W.R. 468; 6 W.R. Mis. 59; 12 B.L.R. 682; 10 W.R. 96; 1 B.L.R. A.C. 62; 11 W.R. 343; 13 W.R. 244; 3 C. 551; 9 C. 568; 14 M. 252; 1 W.R. Mis. 1; 12 Bom. L.R. 682 (a minor joint decree-holder). In a partition decree falling under Cl. 5, an application for execution by one co-parcener saves limitation in favour of all whether plaintiffs or defendants. 3 C. 55; 9 C. 568; 1886 P.J. 287. If the effect of passing of a decree is the passing of several decrees in favour of distinct individuals, the application by one does not save limitation for others. 13 W.R. 244; 7 B. 552.

Application by a Representative of the decree-holder.—An application by a representative of a joint decree-holder saves limitation in favour of others. 24 B. 672.

Application for execution against a Representative.—An Application for execution of a joint decree against one of the judgment-debtors or his representatives saves limitation against all the judgment-debtors and their representatives. 2 C.L.J. 544; 17 M. 76; 36 A. 482; 3 A. 157; 12 B. 48. An application for execution against some representatives saves limitation against all the representatives.

3 A. 517 ; 12 B. 98 ; 31 I.C. 853—18 M.L.T. 517 ; 22 M.L.J. 169—13 I.C. 313—(1916) M.W.N. 112.

Limitation against surety.—An application for execution against the judgment-debtor does not save limitation against his surety. 31 B. 50 ; (1914) M.W.N. 64 ; 28 A. 383.

EXTENSION OF TIME.—Time taken in setting aside an *ex parte* decree—Time taken by the defendant in prosecuting his application for setting aside the *ex parte* decree cannot be deducted, nor does the limitation begin from the date of the dismissal of the application. 18 N.L.R. 190—68 I.C. 728. Under S. 29-E (3) of the Talukdars' Act the time for an application for execution is extended for a period from the date of the decree to the date of submission of the decretal claim to the managing officer. 43 B. 44.

ARTICLE 183, LIMITATION ACT.

Application.	Period.	Starting Point.
An application to enforce a judgment, decree, or order of any Court established by Royal Charter in the exercise of its ordinary original civil jurisdiction, or an order of His Majesty in Council.	Twelve years.	When a present right to enforce the judgment, decree or order accrues to some person capable of releasing the right : Provided that when the judgment, decree or order has been revived, or some part of the principal money secured thereby, or some interest on such money has been paid, or some acknowledgment of the right thereto has been given in writing signed by the person liable to pay such principal or interest, or his agent, to the person entitled thereto or his agent, the twelve years shall be computed from the date of such revivor, payment or acknowledgment or the latest of such revivors, payments or acknowledgments as the case may be.

SCOPE.—The judgments of the High Courts on the appellate side are not within the scope of this article ; they come under Art. 182. 10 B.L.R. 101 P.O. ; 5 M.H.O. 215 F.B. ; 7 B.L.R. 704 F.B. Original jurisdiction includes insolvency jurisdiction. 13 B. 520 P.O. ; 11 B. 138. A decree of a Mofussil Court, though it is being executed

by the High Court is subject to 3 years' limitation under Art. 182. 17 C. 491 ; 24 C. 479 ; 11 I.C. 635 ; 5 M.H.C. 215 F.B. ; 31 M. 24 ; 36 M. 108. Similarly a decree of the High Court passed on its ordinary original side, though it is being executed by a Mofussil Court is governed by the 12 years' limitation under Art. 183. 11 I.C. 216 (O.) ; 11 I.C. 635 (M.). Art. 183 applies also in the case of orders of the Privy Council on appeal whether the decree of the High Court was passed on its original side or on its appellate side. 8 C. 218 F.B. ; 20 C. 551 ; 11 C.L.R. 277 ; 7 C. 620 ; 20 C.W.N. 1051. An order of the Privy Council is governed by Art. 183 when it dismisses an appeal for any cause. 33 A. 154 F.B. reversed in 36 A. 350 P.C. in which case it was held that the order of dismissal for want of prosecution is not an order of the Privy Council under Art. 183 and the decree of the lower court alone was capable of execution.

EXTENSION OF TIME.—The period of twelve years prescribed is extended—(a) when the judgment, decree, or order has been revived ; or (b) some part of the principal money secured thereby, or some interest on such money has been paid ; or (c) some acknowledgement of the right to the above is made.

REVIVOR.—Any order by a competent court holding that the decree is capable of execution operates as a revivor, 20 C.W.N. 899 ; 11 C.L.J. 91 ; 30 C. 979 ; 36 C. 543 = 38 M. 1102 ; 14 C.W.N. 357. See also 42 C. 903. An order for execution in order to act as a revivor must be passed after notice under O. 21, r. 22 where necessary. 6 C. 504 ; 20 C. 551 ; 36 C. 543 ; 7 M. 542 ; 33 M. 187 ; 38 M. 1102. An application for execution without any order for execution does not revive the decree 30 C. 979 ; 28 C.L.J. 641 ; 11 C.L.J. 91 ; 20 C.W.N. 889 F.B. An order of the court that the application for execution is not time-barred acts as a revivor. 11 C.L.J. 91. An order for transfer of the decree to another court is not an order for execution and does not extend the period under this article, 20 C.W.N. 889 F.B. ; 22 C. 921 reversed in 24 C. 244 where it was held that under the circumstances the order was one for execution and helped in reviving the decree. A revivor of decree against one of the judgment-debtors is not a revivor against the others. 38 M. 1102 ; 32 I.C. 1003.

ACKNOWLEDGMENT.—Time runs afresh from the date of acknowledgment.

PAYMENT.—A payment in order to extend time under this article must be a voluntary payment by the judgment-debtor and not one in execution. 6 C. 506.

CHAPTER XII.

SATISFACTION OF DECREES.

MODE OF PAYING MONEYS UNDER DECREES.—(1) All moneys payable under a decree shall be paid as follows, namely :

- (a) into the Court whose duty it is to execute the decree ; or
- (b) out of Court to the decree-holder ; or
- (c) otherwise, as the Court which made the decree directs.

(2) Where any payment is made under clause (a) of sub-rule. (1) notice of such payment shall be given to the decree-holder. (O. 21, r. 1).

SCOPE.—A judgment-debtor under the rule has the option to pay the money into Court or to the decree-holder. 1 Bom. L.R. 644. If the whole amount due under a decree is paid into Court, the decree becomes satisfied without any formal order of the Court regarding satisfaction. 34 I.O. 350 = (1916) 1 M.W.N. 195 ; 15 B. 681. O. 21, r. 1 is not applicable to mortgage decrees. 45 M.L.J. 687 = 75 I.O. 566.

MONEY PAYABLE UNDER A DECREE.—Costs of an application awarded by an order under S. 35, O.P. Code, cannot be said to be money payable under a decree ; hence such costs ought to be paid to the party direct and not to the Court. 12 M. 120.

DIRECTION IN THE DECREE AS TO PAYMENT OF MONEY TO THE DECREE-HOLDER.—Payment into Court is a valid compliance with a decree even though the decree directs payment to the decree-holder. 12 B.L.R. 819 ; 35 B. 35. But when it was provided by the decree that if the plaintiff paid Rs. 100 by the 10th of April 1909 to the defendants the property in dispute would belong to the plaintiff by ownership, otherwise the ownership would rest with the defendants, and the plaintiff did not pay the money to the defendants but elected to pay the money into Court, and as the Court was closed from 10th to 13th April the payment was made into Court on the 14th April, it was *held* that as the money had by the terms of the decree to be paid to the defendant, the plaintiff had no option to pay it into Court and that payment into Court was not in compliance with the terms of the decree. 35 B. 35.

DECREE DIRECTING PAYMENT INTO COURT.—Under a joint decree for pre-emption in favour of A and B, A had to pay the price into Court by the 15th March and in default his claim was to stand dismissed, and then B's claim was to come in. On 15th March A put in a receipt for the price and asked that the payment be certified. On issuing notice to the judgment-debtors, some appeared on the 31st, March and others on the 12th April and confirmed the receipt. *Held* that the payment by A not being certified in court by the 15th March 1915, it could not be considered as payment into court by that date and that consequently, A's claim stood dismissed on the 16th March and the decree in favour of B came into force. 73 P.R. 1916.

PAYMENT TO THE DECREE-HOLDERS.—Payment two out of four decree-holders who hold a decree jointly is not a discharge of the decree and the certificate of

payment given by them cannot bind the others unless they had given authority expressly or impliedly to certify it. (1918) M.W.N. 507=49 I.O. 141.

DEATH OF THE DECREE-HOLDER.—The judgment-debtor is not relieved of the duty of payment of money under a decree by the death of the decree-holder. He should either pay money in court or take directions from court under clause (c). 5 I.O. 63=14 O.W.N. 146. Payment out of Court must be in accordance with the provisions of O. 21, r. 2, otherwise such a payment cannot be recognised as towards satisfaction of the decree. 2 W.R. Mis. 2.

PAYMENT INTO COURT—Arbitrator.—A payment to an arbitrator in the suit is not under O. 21, r. 1, as he is not such an officer of the Court as is authorised to receive payments on behalf of the Court. 3 Bur. L.J. 6=80 I.O. 238.

When a judgment-debtor without notice of the assignment of the decree or of the petition put in by the assignee for execution deposits the money into Court: then it amounts *ipso facto* to a complete discharge. 2 Pat. 754.

PAYMENT UNDER AN INSTALMENT-DECREE.—A debtor cannot allow certain instalments to remain unpaid unless, at the time he makes the payment the instalment was already barred by limitation. 46 B. 848.

PAYMENT INTO COURT AND SATISFACTION OF THE DECREE.—When money is paid into Court in satisfaction of a decree execution is not complete till the money has actually been paid out. 35 B. 452.

SATISFACTION OF THE DECREE IN CASE OF SALE OF THE PROPERTY.—Execution comes to an end with the sale of the property, and whether or not the auction-purchaser obtains possession of the property sold is wholly immaterial for the purpose of the decree and it does not in any way affect it. Though the decree-holder may not be able to obtain possession of the property purchased, he is not entitled to take out further execution for that portion of his purchase money which is represented by the property purchased by him. 72 I.O. 938=1923 P. 22. The execution case comes to an end when the property is sold and the objection to sale is not a question in execution. 72 I.O. 670. A decree, the satisfaction of which has resulted in the decree-holder himself purchasing the same for the full amount of the decree at the auction-sale, is not actually satisfied until the sale has been confirmed. 41 A. 526; 33 B. 311.

MONEY TAKEN OUT BY A THIRD PARTY.—When money is paid out to persons other than the decree-holder and the latter applies for payment of the money to him on the ground that he had no notice of the application for payment by the stranger, it is not competent to the Court to direct the decree-holder to file a suit for the amount and to direct the persons who drew the money out of Court to furnish security for the amount. The proper course for the Court is to treat the application of the decree-holder as one to set aside the *ex parte* order authorising payment. 28 A.L.J. 353=66 I.O. 744.

NOTICE TO THE DECREE-HOLDER.—A notice in writing of the payment of an amount under a decree by the judgment-debtor in Court must be given to the decree-holder and served in the manner provided for the service of summons. 81 I.O. 1001. When the judgment-debtor deposits the decretal amount in Court with its permission, it is the duty of the Court to give notice required by O. 21, r. 1 (2) to the decree-holder. If the judge orders notice it is then necessary for the judgment-debtor to pay the necessary process-fee. But even if he did not pay, the Court is bound to inform the decree-holder of the payment when he applies for execution of the decree. 67 I.O. 243.

EFFECT OF PAYMENT INTO COURT.—Future interest.—When the amount of a decree is paid into Court under O. 21, r. 1, interest on the same ceases to run from the date when the decree-holder receives notice thereof. 42 M. 576. When in execution of a decree another decree is attached and the money payable under the latter decree is paid into Court interest on the amount of the attached decree as well as on the decretal amount due to the attaching decree-holder stops to run from the date of the payment into Courts. 35 C.L.J. 109=64 I.C. 780. The judgment-debtor is relieved from payment of any interest on amounts which he has deposited in court. 40 A. 125.

PAYMENT BY A STRANGE R.—Payment into Court under O. 21, r. 1, can only be made by or on behalf of the person who is liable under the decree for that payment or by a recognised agent under O. 3, r. 2, C. P. Code or by a pleader duly authorised. A payment by a person who has got a sham sale-deed from the judgment-debtor does not satisfy the decree and the sale cannot be set aside on that payment having been made. (1910) M.W.N. 195=34 I.C. 350.

PAYMENT BY THE SURETY.—Payment made by a surety under S. 55 (4), C.P. Code, is to be credited against the decree and is not to be made available to the decree-holder over and above his decretal amount. 25 C.W.N. 36 ; 15 C. 171.

SATISFACTION OF THE DECREE BY ONE OF THE JUDGMENT-DEBTORS.—When one of the judgment-debtors satisfies a mortgage-decree he obtains a lien on his co-sharer's property to the extent of their share of the decretal liability. 26 B. 379. So far as the decree-holder is concerned, the decree is satisfied when the property is sold and money paid to him. He is not concerned with the delivery of property to the purchaser. 84 I.C. 526 ; 1923 C. 345. A decree, the satisfaction of which has resulted from the decree-holder himself bidding the full amount of the decree, is not actually satisfied until the sale has been confirmed. 55 I.C. 626=38 M.L.J. 441 ; 17 A.L.J. 617.

SATISFACTION BY COMPROMISE IN EXECUTION.—In execution of a decree a compromise was effected by the parties as to the mode of satisfying the decree and it was accepted by the Court which dismissed the execution application then pending and directed that if the parties did not adhere to the compromise a fresh application for execution would have to be filed. Thereupon several payments were made accordingly but the whole amount not having been paid the decree-holder was held entitled to apply in execution. 13 I.C. 81.

SATISFACTION BY DELIVERY OF POSSESSION.—A decree can be executed only once and if there has been a complete execution, a second application on that behalf cannot be maintained. 70 I.C. 755=1923 M. 26. Execution proceedings come to an end as soon as possession is delivered. 55 I.C. 646. When an application for delivery of possession is ineffectual a subsequent application for the same relief is maintainable. 18 L.W. 883. A delivery of possession to the decree-holder after a conditional order for stay of execution proceedings passed by the appellate Court is not effectual in law and the decree-holder can after the disposal of the appeal of the judgment-debtor apply again for delivery of possession. 16 I.C. 708 ; 43 M.L.J. 179=31 M.L.T. 356.

SATISFACTION BY DISCHARGE OF DEBTOR ON THE REQUEST OF THE DECREE-HOLDER.—If the decree-holder gets a discharge of the judgment-debtor from the civil prison, he is bound, on his subsequent application for execution to show by adequate reasons why he applied to have the debtor discharged. In the absence of adequate reasons he must be taken to have had his decree satisfied. 4 Bom. H.C. A.C. 1.

CHAPTER XIII.

STAY OF EXECUTION.

STAY OF EXECUTION BY THE COURT WHICH PASSED THE DECREE.

STAY BY COURT WHICH PASSED THE DECREE.—Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing therefrom the Court which passed the decree may, on sufficient cause being shown order the execution to be stayed. (O. 41, r. 5 (2).)

No order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the Court making it is satisfied—

(a) that substantial loss may result to the party applying for stay of execution unless the order is made ;

25 B. 24

(b) that the application has been made without unreasonable delay ; and

(c) security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him. (O. 41, r. 5 (3).)

Notwithstanding anything contained in sub-rule (3), the Court may make an *ex parte* order for stay of execution pending the hearing of the application. (O. 41, r. 5 (4).)

DECREE FROM WHICH AN APPEAL LIES.—The application will not be entertained unless the decree is one from which an appeal lies and the application is made before the expiry of the time allowed by law for appealing therefrom. 9 A. 36 ; 10 C. 817. The rule does not apply to the stay of execution of an unappealable decree. 9 A. 36. The order of stay cannot be made when no appeal has been preferred. 31 C. 1081 ; 10 C. 817. A civil Court has no jurisdiction to stay execution in a case when appeal lies to the Privy Council. 5 M.H.C.R. 98.

STAY AFTER EXECUTION.—No order for stay of execution can be made after a decree has been satisfied. 58 I.O. 442 ; 12 C.L.R. 532 ; 79 I.O. 1=5 Pat. L.T. 556.

STAY OF EXECUTION AFTER THE APPEAL IS FILED.—The first Court has no power to stop execution by delivery of property after an appeal has been filed. 35 A. 119 ; 76 I.C. 174 ; 31 O. 973. During the pendency of an appeal against an order refusing to set aside an *ex parte* decree the original Court has discretion to stay

proceedings in execution pending the disposal of the appeal. There is no such power vested in the appellate Court. 35 I.C. 443. Where no appeal has been filed the lower Court alone which passed the decree has power to grant stay of execution. 43 A. 513; 17 W.R. 341.

EXERCISE OF POWERS IN APPEALS FROM ORDERS IN EXECUTION.—

The powers conferred by r. 5 above (for stay of execution) shall be exercisable where an appeal was preferred, not from the decree but from an order made in execution of such decree. (O. 41, r. 8.). This rule has given legislative recognition to the decision of the Calcutta High Court. 28 C. 734.

DECREE CAPABLE OF EXECUTION.—A preliminary decree for partition of non-revenue-paying property is not capable of execution and hence no order can be passed under O. 41, r. 5, for stay of execution. 20 A. 311; A.W.N. (1898) 99; 21 A. 409; 1 C.W.N. 264; 1 I.C. 812=13 C.W.N. 690. See 5 C.W.N. 781.

SECURITY.—Before passing an order for stay of execution the Court should be satisfied that security has been given by the applicant for the due performance of such decree as may be binding on the applicant. A.W.N. (1888) 249; 12 I.C. 692=(1911) 2 M.W.N. 432; 9 W.R. 448; 58 I.C. 442. The Court has power to modify or cancel the security. 13 W.R. 403.

SUFFICIENCY, ETC., OF SECURITY.—The security should be such as may not lead to protracted litigation for its enforcement, 37 C. 754, 775. The judgment-debtor should be given an opportunity for showing that the sum demanded is more than the amount awarded by the decree. 20 W.R. 52. The Court should enquire into the sufficiency of the security. 44 I.C. 156=22 C.W.N. 657.

FORM OF SECURITY.—The security should be in the form prescribed in Appendix G of the Code, which requires that there should be a mortgage of property to secure the decree and in the case of the value of the property exceeding Rs. 100, the mortgage should be registered. 2 R. 429=84 I.C. 302. Where the security bond provided for the obeying and fulfilling all orders and decrees passed in appeal the obligation extended to the final decree passed after remand by the High Court in second appeal. 2 B. 654; 3 B. 204 (on appeal from 2 B. 654); 12 B. 71.

REALISATION OF SECURITY.—Where immovable property is given by way of security, it can be realised by the decree-holder, without a separate suit for the purpose, by sale of the property. 41 M. 327; 30 C. 1060; 1 C.L.R. 118; 17 C.L.J. 267. Where a surety has been given as security in the appellate Court, a separate suit must be brought against the surety, the security bond cannot be enforced in execution. 22 C. 25; 15 M. 203; 2 A. 604. When execution is taken out both against the judgment-debtor and the surety the money paid in must be applied after satisfying the decree from the property of the judgment-debtor. 19 B. 578.

DISCHARGE OF SURETY.—On reversal of a decree, the liability of the surety ceases. 13 W.R. 403. For other cases see Chapter III.

NOTICE TO THE DECREE-HOLDER.—A final order staying execution should not be made without a notice to the decree-holder to show cause why the execution should not be stayed. 15 B. 536; 79 I.C. 1=5 Pat. L.T. 556. If the decree-holder has obtained possession of the property in dispute by execution without notice to the judgment-debtor, the latter may ask for a stay of execution. 79 I.C. 188=4 Pat. L.T. 508. An *ex parte* order staying execution, may be set aside by an application by the decree-holder. 9 A. 36.

COSTS.—The applicant should as a rule pay the costs of the application in all cases as it is an indulgence towards him to allow stay of execution. 25 O. 898.

REVIEW.—The Court can at any time review its order as to stay of execution and cancel or vary it. 9 A. 36.

APPEAL.—See notes on S. 47.

STRANGER APPLYING FOR STAY OF EXECUTION.—It is not competent to the executing Court to refuse to sell property ordered to be sold by the decree-holder, on the mere ground that a stranger impeaches the decree as having been fraudulently obtained. When a stranger wishes to stay the execution of the decree, the proper course for him is to file a suit and obtain an injunction for that purpose. 8 B. 532

SUFFICIENT CAUSE.—On *prima facie* good grounds being shown to exist in a proper case for staying execution of a decree, the Court executing the decree may well grant to the judgment-debtor reasonable time for applying to a higher Court for an order for stay of execution. 52 P.L.R. 1909=4 I.C. 552. On the dismissal of a claim under rr. 58-63 of O. 21, the sale of attached property ought to be stayed until the decision of the regular suit which the claimant had brought. 24 W.R. 70. Where A obtained a decree for possession against certain persons of an undivided moiety of a dwelling-house on a title by purchase from them and sought to obtain execution of his decree B, alleging that he was entitled jointly with others to the remaining undivided moiety and he was by his family and the defendants in actual possession of the house according to his title, brought a suit against A and his vendors for the alternative purpose of ousting him from all benefits of his decree on the ground that he had obtained no title by purchase, or if he had obtained such a title and had a right to have the decree executed, then of obtaining partition of the dwelling house, *held* that an application by B for an interim injunction to restrain A from taking possession under his decree until the decision in the partition suit should be granted. 6 B.L.R. 571. When a decree directing payment of money is appealed against by the party directed to pay, the appellate Court, on the application of the appellant should order execution of the decree to be stayed, so far as it directs payment, on his lodging the amount in Court, unless the other party gives security for the re-payment of the money, in the event of the decree being reversed. If such security be given by the successful party, then the stay of execution should not be granted. 18 B. 241. A party against whom a decree has been made which specifies a time for its performance, is not merely by reason of his failure to carry out the orders of the Court guilty of such contempt so as to disentitle him to protection, from the appellate Court. If the appeal is lodged with diligence and the application is made for stay of execution, and it is proved that material injury is likely to result from executing the decree, the appellate Court will grant stay on terms though the party may be constructively guilty of contempt of Court. 4 I.C. 746=10 O.L.J. 631. A decree-holder is not to be deprived of the fruit of his decree unless sufficient cause is established for stay of execution. 38 O. 754; 25 B. 243; 9 W.R. 448. That the decree was *ex parte* and without notice is a sufficient cause. 8 W.R. 202. That the decree was obtained by fraud is sufficient for stay of execution. 4 M. 324; 75 I.C. 419=1923 L. 514. That the decree was passed without jurisdiction gives sufficient cause. 7 B. 481. That the amount entered in the decree is wrong is a sufficient cause. 9 W.R. 361. That the order of execution was without notice under O. 21, r. 22 is a sufficient cause. 13 O. 257. That the person applying for execution has no right to do so or that the order of transmission of the decree is wrong is a sufficient cause. 5 O. 736; 23 W.R. 154. That it is safer for the Court which passed the decree to decide the objection is a sufficient case to stay execution. 8 O. 916. The applicant must show that a serious injury will be the result to the party applying

unless the delay asked for be granted and he has come promptly to make the application. 10 M.I.A. 322 ; 5 M.I.A. 298. The value of the property advertised for sale is a very material particular for the purchaser to know and where a fair and accurate value is not given it is a good ground for stay. 7 Bur. L.T. 64=24 I.O. 468. The Court executing the decree has power to stay execution to enable the applicant to apply to His Majesty in Council to pass an order staying the execution of the decree pending the disposal of the appeal. 3 O.O. 243. The fact that it would be difficult for the applicant to get back the property in case he succeeds in appeal is a sufficient cause. 15 I.O. 876=94 P.W.R. 1912. A bare statement supported by affidavit that the appellant will suffer loss is not sufficient. 2 L. 61. If the decree-holder has sufficient security in the property itself which is under attachment and remains so, the execution may be stayed. 1923 L. 445. If the application for stay of execution is supported by an affidavit and it is not contradicted by an affidavit there is sufficient cause for stay of execution. A.W.N. (1888) 249. The most important thing to be considered in deciding whether a stay of execution should be ordered or not is whether the party applying for stay has succeeded in showing that substantial loss will result if the order applied for is made. 61 I.O. 827. In any application for stay of the decree as to costs, where the respondent is an insolvent, the appellant may be directed to pay the costs to the respondent's solicitors on the latter's personal undertaking to re-pay the same to the appellant in the event of the success of the appeal. 16 L.W. 975. The execution of a decree for possession of property should not be stayed unless all the three conditions mentioned in O. 41, r. 5 (3) are satisfied. 61 I.C. 827. A stay of execution cannot be ordered if the applicant has been guilty of great delay and there is no ground for stay. 17 W.R. 160. When a mortgage decree can be executed first against the mortgaged property and for the balance, if any, against the judgment-debtor personally and against his other properties, execution cannot be stayed simply on the ground that claim by a prior mortgagee is pending. 60 I.C. 378. The execution of a pre-emption decree, except as to costs may be stayed provided the decree-holder is permitted to recover from the Court the money deposited by him subject to his right to redeposit it in the event of the failure of the appeal. 79 P.L.R. 1920=55 I.O. 933. But a stay is not ordered in every case of decree for possession of immoveable property. 61 I.O. 827 ; 1922 L. 364. The Court has power to stay execution merely on the possibility of the appellate Court reversing its decision. 11 C. 146. Where a stay of execution has been refused by the Court executing the decree, an application made to the Court of appeal must be supported by special circumstances, and the allegations as to misdirection and absence of evidence in support of order of the Court are not sufficient. (1891) 1 Q.B. 346 ; 24 Oh. Div. 305. Non-expiry of the period of appeal is not a sufficient cause for stay of execution. 5 W.R. Mis. 53. The fact that the day of sale is very near to the last day for payment of revenue is not sufficient ground for stay of execution. 13 W.R. 281. The applicant must satisfy that he is likely to sustain substantial injury by execution taking place before disposal of appeal. 17 I.C. 219=23 M.L.J. 316 ; 25 B. 243 ; 2 L. 61 ; 1922 L. 364 ; 61 I.C. 827 ; A.W.N. (1888) 245 ; 61 I.C. 9 ; 79 I.C. 188=4 Pat. L.T. 508. This rule applies to moveable as well as to immoveable property. 2 L. 61. Execution cannot be stayed merely on the ground of annoyance to feelings. 71 I.C. 219=23 M.L.J. 316 ; 61 I.O. 77.

ORDER OF STAY WHEN TAKES EFFECT.—An interim order for stay of execution of a decree takes effect from the time it is pronounced and not from the time it is officially communicated and proceedings contrary to such order are liable to be set aside as having been taken without jurisdiction. 53 P.W.R. 1917=41 I.C. 752 ; 38 M. 766 ; 3 C.L.J. 67=33 O. 927 ; 15 O.L.J. 335 ; 2 A. 686. (*contra* in 33 M. 74 ; 1 C.W.N. 226 ; 33 M.L.J. 515=43 I.C. 214 F.B. ; a sale held before the communication of the order of stay by the appellate Court to the executing

Court is not invalid, when the executing Court made an order staying sale, the sale is invalid if effected by the officer conducting it. 9 O.O. 289 (12 A. 96, followed). A conditional order for stay of execution does not come into force till the condition is fulfilled, and a sale held after the passing of such an order but before the condition is fulfilled is not affected by the order. 22 A.L.J. 413=83 I.C. 1028 A sale held in ignorance of the order staying execution is only an irregularity and cannot be set aside unless the judgment-debtor is materially prejudiced. See O. 21, r. 90—"Irregularities."

EFFECT OF ORDER STAYING EXECUTION.—When the High Court ordered that certain execution proceedings be stayed and the case struck off when the security was given, the Court cannot be taken to have deprived the decree-holder of any rights that he already had. 2 I.C. 265. An order staying execution is effective as long as it lasts although it may be subsequently discharged. 43 A. 198. But if the order staying sale is set aside as being due to fraud, it has no force and is invalid and a sale held during the existence of the order is valid. 43 I.C. 656=16 A.L.J. 46.

CONDITIONAL ADJOURNMENT.—An order providing that if any further adjournment is asked for the party wanting it would pay damages, is illegal, as it awards damages for an event which may or may not happen. Even if it is a valid order it is not executable. 1923 Pat. 202=72 I.C. 1035. A conditional order staying execution does not come into force till the condition is fulfilled. 83 I.C. 1028=1924 A. 698.

STAY OF EXECUTION PENDING SUIT BETWEEN DECREE-HOLDER AND JUDGMENT-DEBTOR.—Where a suit is pending in any Court against the holder of a decree of such Court on the part of the person against whom the decree was passed, the Court may on such terms as to security or otherwise as it thinks fit, stay execution of the decree until the pending suit has been decided. (O. 21, r. 29.)

ADDITIONAL RULE FOR THE PUNJAB—When a suit under Order 21, rule 63 is pending the Court in which such suit is filed may if it considers that the execution of the former decree be stayed, intimate the fact to the executing Court which shall thereupon stay execution until the suit is decided. (O. 21, r. 29-A.)

SCOPE.—The Rule 29 only relates to staying proceedings in execution by the Court which passed the decree in which proceedings are pending. 15 A. 196; 10 O. 146. But a Court has no jurisdiction to restrain a decree-holder from executing his decree, merely on the possibility of the appellate Court reversing the decision of such Court in another suit instituted by some of the judgment-debtors, relative to their rights in the decretal property although it had a right while the question in that suit were awaiting trial before it to restrain the defendant (decree-holder) by an interim order upon him personally from enforcing his decree in the former suit. 10 O. 146. This section does not apply when execution has been carried out and the decree-holder placed in possession of the property. 7 A. 73. A suit between the representatives of the judgment-debtor is not within the scope of this rule. 7 O. 733. An

order for stay of execution of an award does not fall under this rule as it is not a decree within the meaning of this rule. 35 B. 196.

DECREE.—An award filed under S. 11 of the Indian Arbitration Act is not a decree. Its execution therefore cannot be stayed under this rule. 35 B. 196.

SUCH COURT.—It has reference to the Courts mentioned in r. 28 of O. 21, which are "the Court by which the decree was passed or the Court of appeal from such decree." 130 P.R. 1908; 6 N.W.P. 181.

STAY OF EXECUTION OF A DECREE PASSED BY THE HIGH COURT IN THE EXERCISE OF ITS ORIGINAL CIVIL JURISDICTION.—An order for stay of execution on the original side of the High Court pending an intended appeal must be made ordinarily to the judge who tried the case. 48 O. 796.

STAY OF EXECUTION BY APPELLATE COURT.

STAY BY APPELLATE COURT.—An appeal shall not operate as a stay of proceeding under a decree or order appealed from except so far as the appellate Court may order; nor shall, execution of a decree be stayed by reason only of an appeal having been preferred from the decree, but the appellate Court may for sufficient cause order stay of execution of such decree. (O. 41, r. 5 (1).)

No order for stay of execution shall be made under sub-rule (1) unless the Court making it is satisfied,—

(a) that substantial loss may result to the party applying for stay of execution unless the order is made;

(b) that the application has been made without unreasonable delay; and

(c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him. (O. 41, r. 5 (3).)

Notwithstanding anything contained in sub-rule (3) the Court may make an *ex parte* order for stay of execution pending the hearing of the application. (O. 41, r. 5 (4).)

SCOPE.—An original decree is not suspended by the presentation of an appeal therefrom. 46 O. 670. When an appeal has been preferred against a decree, the appellant may ask for a stay of execution though he has failed in the meanwhile to carry out the terms of the decree and has thus been guilty of contempt. 4 I.C. 746=10 O. L.J. 631. An appellate Court has power to stay execution when an appeal is pending in such Court. 28 C. 734; 1 A. 178 F.B.; 37 I.C. 752; 3 O.L.J. 29; 15 I.C. 876=94 P.W.R. 1912; 54 I.C. 222; 31 O. 722. The power of staying execution is discretionary

though the discretion should be exercised judicially. 82 I.O. 435. But where there is no appeal, the appellate Court cannot order stay of execution. 48 A. 198. The appellate Court cannot order stay of execution of the decree pending the disposal of an appeal against an order refusing to set aside an *ex parte* decree. 31 I.O. 443; 31 O. 1091; 76 I.O. 174. The appellate Court cannot order stay of execution of its own decree, when it reverses a decree in favour of the plaintiff in a suit. 10 Bom. H.C.R. 411. An application for stay of execution may be made to the appellate Court even when no order for execution has been made, when it is shown that an application for execution is pending or is about to be made and substantial loss will result to the party applying unless execution is stayed. 2 Mys. L.J. 88 (*contra* held in 58 I.O. 302; 25 B. 583; that where no application for execution is pending there can be order for stay of execution).

STAY OF EXECUTION BY COURT TO WHICH A DECREE IS TRANSFERRED FOR EXECUTION.

WHEN COURT MAY STAY EXECUTION.—(1) The Court to which a decree has been sent for execution shall upon sufficient cause being shown stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the Court by which the decree was passed or to any Court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay execution or for any other order relating to the decree or execution which might have been made by such Court of first instance or appellate Court, if execution had been issued thereby or if the application for execution had been made thereto.

(2) When the property or person of the judgment-debtor has been seized under an execution, the Court which issued the execution may order the restitution of such property or the discharge of such person pending the result of the application.

(3) Before making an order to stay execution or for the restitution of the property or the discharge of the judgment-debtor the Court may require such security from or impose such conditions upon the judgment-debtor as it thinks fit. (O. 21, r. 26.)

No order of the restitution or discharge under rule 26 shall prevent the property or person of a judgment-debtor from being retaken in execution of the decree sent for execution. (O. 21, r. 27.)

Any order of the Court by which the decree was passed or of such Court of appeal as aforesaid in relation to the execution of such decree shall be binding upon the Court to which the decree has been sent for execution. (O. 21, r. 28.)

SCOPE.—Notwithstanding the order of transfer, the Court which passed the decree has power to order stay of execution of the decree. The executing Court merely exercises a delegated jurisdiction, and it works out the orders made by the Court which passed the decree. 28 M. 466. The executing Court may temporarily stay execution of the decree. 7 A. 330. But it is often better to stay execution and refer the parties to the Court which passed the decree instead of deciding the objections itself. 35 A. 119. This rule avoids any hardship resulting from simultaneous execution by allowing an application to be made to the Court executing the decree. 63 I.C. 809=13 Bar. L.T. 235. The order of the executing Court demanding security from the judgment-debtor amounts merely to the renewal of its previous stay order coupled with the condition which it is authorised to impose under O. 21, r. 26 (3). 1925 L. 552=91 I.C. 772.

STAY OF EXECUTION BY THE HIGH COURT IN CASES OF APPEALS TO THE PRIVY COUNCIL.—The High Court may, if it thinks fit on special cause shown by any party interested in the suit, or, otherwise appearing to the Court,

(a) and (b)

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(c) Stay the execution of the decree appealed from, taking such security from the appellant as the Court thinks fit for the due performance of the decree appealed from or of any order which His Majesty in Council may make on the appeal. (O. 45, r. 13 (2) (c).)

The High Court has power to stay execution notwithstanding that an appeal from such decree has been admitted by special leave of His Majesty in Council. 38 O. 395 P.C.; 10 O.L.J. 326; 4 I.O. 452; (*contra* held in 9 O.O. 243). Application for stay of execution ought always to be made at the first instance at any rate to the Court in India which has ample power to deal with the matter according to the circumstances of the particular case and has knowledge of details which the Board cannot possess on an interlocutory application. 29 M. 379 P.C. The High Court can stay execution under this rule only after the grant of a certificate for the admission of appeal. 4 I.C. 106=20 M.L.J. 140; 16 I.C. 845=6 S.L.R. 86; 5 O.W.N. 562; 19 B. 10; 29 P.L.R. 1915=27 I.O. 572 (the execution should not be stayed without sufficient cause). Once the execution has proceeded under the decree of the High Court subsequently appealed against to the Privy Council, it is beyond the power of the High Court to stay execution. 8 W.R. 144.

INHERENT POWERS.—The High Court has inherent powers under S. 151 in appropriate cases to stay execution on receipt of an application for leave to appeal to the Privy Council, pending the passing of an order on the application. This inherent power should be however sparingly exercised in view of the provisions of O. 4 r. 13, and the

onus is on the applicant to establish good ground for staying execution. 82 I.O. 739 ; 40 O. 955 ; 1 Lah. Cas. 358. Whenever an appeal lies to the High Court, it has inherent power to stay proceedings in the lower Court. 52 I.O. 185 ; 3 C.L.J. 29 ; 31 O. 722 ; 4 I.O. 309 ; 82 P.R. 1910. The inherent powers of the appellate Court are not restricted or cut down by the special or emergency powers given to the executing Courts under O. 41, r. 6. 41 M. 813. A Court has inherent power under S. 151 to stay execution of its decree pending the decision of appeal. 82 P.R. 1910. 75 I.O. 419 = 1923 L. 514.

STAY OF EXECUTION BY THE PRIVY COUNCIL.—When the Judges of the High Court had differed in opinion as regards the propriety of staying execution and their discretion had not been exercised, their Lordships of the Privy Council ordered stay of execution. 22 O. 1 P.O. The Privy Council would not interfere unless the lower Courts had jurisdiction to order stay (*ibid*). It is not competent to the Privy Council to order stay of execution. It may make an intimation to the Court below to stay the execution. 14 O. 290 ; 2 C.W.N. 59.

CHAPTER XIV.

RES JUDICATA AND EXECUTION PROCEEDINGS.

Orders in execution proceedings do not come directly within the language of S. 11, C. P. Code, as there is no former suit in such cases. 37 A. 589; 80 I.C. 722; 70 I.C. 530; 76 I.C. 148. But such orders are, if not appealed from, binding on the parties in all subsequent proceedings on the general principles of law. These principles are analogous to those of *Res judicata* strictly so-called under S. 11, C. P. Code. It has been finally decided by the highest judicial authority, the Privy Council, and has been recognised by all the Courts in India. 6 A. 269 P.C.; 7 A. 102 P.C.; 8 C. 51 P.C.; 11 C. L.J. 357; 10 A. 79; 129 P.R. 1888; 14 C.W.N. 114 and 493; 35 B. 245; 17 C.L.J. 55; 14 Bar. L.R. 135; 14 A. 64; 74 I.C. 781=2 P. 771; 80 I.C. 722; 37 M. 462; 17 C.L.J. 125; 109 P.R. 1913; 21 Bom. L.R. 344=50 I.C. 972; 40 M.L.J. 566=63 I.C. 189; 48 C. 499; 36 C. 336 P.C.; 30 M. 402; 1922 L. 361; 16 I.C. 238. The judgment pronounced in execution proceedings is as binding between the parties and those claiming under them as an interlocutory or final judgment in a suit is binding upon the parties. The binding force of such a judgment depends not upon a statutory law, but upon general principles of law. 47 M.L.J. 286=81 I.C. 576 P.C. When at one stage an order is made disallowing the objections of the judgment-debtor, the order is binding in all subsequent stages of the same execution. 64 I.C. 724. (42 C. 440, *referred to*); 48 I.C. 226=35 M.L.J. 575; 44 I.C. 654. An order in the course of an execution proceedings, which is not appealable is final between the parties not under S. 118, C. P. Code, but upon general principles of law as an interlocutory order in the suit. 14 Bom. L.R. 573=16 I.C. 338. A decision at any stage of an execution proceedings is binding not on the ground of *res judicata* but upon the general principles of law. 6 A. 269; 48 C. 499; 4 I.C. 119=9 C.L.J. 356; 5 I.C. 89=11 C.L.J. 357. Where in execution of a decree against a firm, a definite decision affecting a particular piece of property or a particular person, has been arrived at, and from that decision nothing has been done by way of appeal or institution of suit, the decree is a final one between the parties and the same point cannot be raised in a subsequent proceeding. 45 A. 735. When a District Judge on appeal disallowed all the objections of the judgment-debtor to execution and such order of the judgment-debtor was appealed against, his successor in office could not on appeal arising out of a subsequent order of the lower Court in the same proceedings, reopen the question already decided by his predecessor and direct the disposal afresh of all the objections originally urged by the judgment-debtor. 3 A. 173. The principle of *res judicata* does not depend for its application upon the question whether the decision which is to be used as an estoppel was a right decision or a wrong decision in law or on facts. 24 A. 133; 75 P.R. 1905. Contrary rulings.—The provisions of S. 11, C. P. Code do not apply to execution proceedings. 70 I.C. 530=1923 N. 119; 32 I.C. 754; 32 M.L.T. 157; 27 I.C. 966; 11 I.C. 980; 8 I.C. 22; 2 I.C. 105; 68 I.C. 239; 46 M. 768 F.B.; 73 I.C. 213; 74 I.C. 577=1923 L. 560.

Taking the analogy of *Res judicata*, it may be conveniently laid down that the following conditions must occur in order to make a matter barred on the principles of *Res judicata*.

1. THE MATTER DIRECTLY AND SUBSTANTIALLY IN ISSUE IN BOTH THE APPLICATIONS MUST BE THE SAME EITHER ACTUALLY OR CONSTRUCTIVELY.

2. PARTIES TO THE SUBSEQUENT PROCEEDINGS MUST HAVE BEEN PARTIES TO THE FORMER PROCEEDINGS AND LITIGATING UNDER THE SAME TITLE. 21 I.O. 938 ; 101 P.R. 1915.

3. THE FORMER APPLICATION MUST HAVE BEEN HEARD AND FINALLY DECIDED. A.W.N. (1882) 128 ; 23 B. 35 ; 32 B. 296.

4. THE COURT WHICH DECIDED THE FORMER MATTER IN DISPUTE MUST HAVE BEEN A COURT OF COMPETENT JURISDICTION TO EXECUTE THE DECREE.

5. Although the doctrine laid down in S. 11 may be applied to certain proceedings in execution arising out of the same judgment so as to put an end to the litigation and may possibly be applied in certain cases when certain suits have been brought raising points which have already been decided in execution cases sought between the same parties, THE SPECIAL RULES LAID DOWN IN THE EXPLANATIONS 4 AND 5 TO SECTION 11 WHICH GO BEYOND THE ORDINARY DOCTRINE OF *RES JUDICATA* OUGHT NOT TO BE APPLIED GENERALLY TO EXECUTION CASES. 37 A. 589 ; 24 M. 681 ; 3 Pat. L.T. 403—67 I.O. 656 ; 50 I.O. 972.

An omission to raise objection to a wrong claim in execution is not *res judicata* in a later execution application as the PRINCIPLE OF IMPLIED OR CONSTRUCTIVE *RES JUDICATA* IS NOT APPLICABLE TO EXECUTION PROCEEDINGS. 19 A. L.J. 954. The principle laid down in the rule that where a relief claimed in the plaint is not expressly granted, it will be deemed to have been refused, does not apply to applications in execution proceedings. 24 M. 681 ; 40 M. 780 ; 40 M. 1016.

6. The order which is to have the effect of *res judicata* must have been passed IN A PROCEEDING WHICH TERMINATED IN AN ORDER IN AN EXECUTION PROCEEDING, AND IS LIABLE TO BE SET ASIDE IN APPEAL FROM A FINAL ORDER IN THE SAME PROCEEDING EVEN, if the interlocutory order had not been incidentally appealed against. 89 P.R. 1889 ; 143 P.R. 1889 ; 11 I.O. 216.

7. THE ISSUE MUST BE AN ISSUE MATERIAL TO THE DECISION OF THE CASE AND NOT A COLLATERAL OR INCIDENTAL MATTER.—28 O. 122.

8. THE PRINCIPLE OF CONSTRUCTIVE *RES-JUDICATA* SHOULD BE VERY CAUTIOUSLY APPLIED TO EXECUTION PROCEEDINGS.—40 M. 1016 ; 40 M. 780 ; 32 I.O. 754 ; 38 A. 289 ; 35 I.C. 234 ; 37 I.O. 78 ; 45 C. 530 ; 1 Pat. L.R. 145 ; 83 I.O. 155—26 Bom. L.R. 817.

1. THE MATTER DIRECTLY AND SUBSTANTIALLY IN ISSUE IN BOTH THE APPLICATIONS MUST BE THE SAME, EITHER ACTUALLY OR CONSTRUCTIVELY.—The effect of the previous order will be confined to the point actually in contest between the parties. 11 B. 537 ; 14 B. 206 ; 15 A. 84 F.B. ; 30 I.O. 523 (A.) ; 12 M. L. J. 24 ; 27 I. C. 950 ; 1923 N.1. There is no *res judicata* when the relief claimed in the two applications is different. 18 M. 482 ; 30 M. 504 ; 39 A. 264 P.C. ; 39 C. 848 ; 4 L.W. 101. When an objection to the maintainability of an application for execution on the ground of limitation is raised, but not decided, it is not *res judicata*. 44 I.C. 220. An order made in execution proceedings whether right or wrong bars a subsequent application, when the validity of the first order is directly in question to determine whether the latter application is maintainable. 40 M. L. J. 556—63 I.O. 189. The matter must be directly and substantially decided. 45 C. 530 ;

37 I.O. 78 ; 11 O.C. 220 ; 14 B. 206 ; 25 O. 262 ; 8 C. 51 ; 24 A. 282 ; 31 O. 822 ; 7 A. 282 ; 18 A. 564 ; 18 L.W. 652 ; 67 I.O. 663 = 1923 O. 287. The decision on a question in issue is binding between the parties, though as to some of the parties it was based on agreement, and as to others on an adjudication by the court. 47 O. 446.

2. PARTIES TO THE SUBSEQUENT PROCEEDINGS MUST HAVE BEEN PARTIES TO THE FORMER PROCEEDINGS AND LITIGATED UNDER THE SAME TITLE.—33 M. 488 ; 15 M. 477 ; (1918) M.W.N. 748 ; 65 I.O. 266 = (1922) Pat. 63 ; 81 I.O. 576 = 47 M.L.J. 286. When A. has got two decrees against B, an objection by the claimant C, allowed in execution of one acts as *res judicata* in the execution of the other decree. 89 P.L.R. 1909 = 4 I.O. 970. An order allowing execution against the judgment-debtor does not operate as *res judicata* against transferees before execution, and does not debar them from raising the plea that the execution application was barred by limitation. 21 I.O. 938 = 18 C.L.J. 264. Execution proceedings between the objector and the decree-holder do not operate as *res judicata* so as to bar a subsequent objection to the attachment by the judgment-debtor. A.W.N. (1890) 170 ; 8 A. 233. A judgment-debtor who was not a party to a previous application for execution of a decree or to any order made upon it is not precluded from showing that the said application was barred by limitation and therefore was not in accordance with law. 1923 O. 322 ; 67 I.O. 879. When an order recognising the payment to one of the decree-holders was made behind the back of others, such order would not bind them. A.W.N. (1883) 19. The parties must be litigating under the same title. 17 O. 57.

3. THE FORMER APPLICATION MUST HAVE BEEN HEARD AND FINALLY DECIDED.—The adjudication must be on the merits in order to operate as *res judicata*. 15 A. 84 F.B. ; 48 P.R. 1900 ; 28 O. 122 ; 11 B. 537 ; 22 B. 83 ; 7 A. 564 ; 16 A. 26 ; 34 B. 189 ; 16 A. 390 ; 30 I.O. 707 ; 12 M.L.J. 24 ; 32 B. 296 ; 3 M.L.J. 189 ; 76 I.O. 761 ; 14 I.C. 197 ; 3 O. 47 ; 23 B. 35 ; 21 O. 784 ; 28 M. 355 ; 7 B. 408 ; 44 I.O. 654. Where an order on merits had not been made and the court merely declined to entertain the application, a subsequent application will not be barred. 3 O. 47 P.O. A decision in the course of execution proceedings on a question which properly arises for consideration is final and binding between the parties. The binding character of the order is not affected by the circumstance that as to some of the parties it was based on agreement and as to others on an adjudication by the court. 47 O. 446. When an objection of a party in execution proceedings is disallowed without any adjudication of the question raised by him it cannot operate as *res judicata*. 17 O. 57. Where the execution application is withdrawn there is no *res judicata*. 23 B. 35 ; 43 P.R. 1900 ; 36 A. 172 ; 32 B. 296. Where an objection petition is dismissed for default there is no decision on merits and hence no *res judicata*. 1923 O. 287 ; 67 I.O. 663. A judgment-debtor who puts forward objections in the execution department is not always bound to put forward all possible objections once and for all. If he omits any, the matters which he omits and which were never raised or decided cannot always be treated as *res judicata* against him. 32 I.C. 754 = 2 O.L.J. 611. An order in prior execution proceedings which does not decide the point raised in a later application does not operate as *res judicata*. (1923) M.W.N. 335 = 18 L.W. 652. Where a decision lays down what the law is and it is found to be erroneous, it cannot have the force of *res judicata* in a subsequent proceeding for a different relief. 16 O.W.N. 621 = 14 I.O. 124. The plea of *res judicata* does not apply to execution proceedings unless the objection of the judgment-debtor on the previous occasion was disallowed on the merits. 28 O. 122 ; 11 C. 301. If the former application is dismissed for default there is no *res judicata*. 47 I.O. 154 = 4 Pat. L.J. 330 ; 10 I.C. 359 = 13 M. 131. There is no *res judicata* if the objection to the execution and the application for execution are simply dismissed or struck off in default. 28 O. 122 = 10 O.W.N. 209 ; 22 B. 83 ; 105 P.R. 1882 = 48 P.R. 1900 ; 12 O. L.J. 312 ; 15 A. 84 F.B. ; 14 O.W.N. 1900. The dismissal of petition of objections to

execution of a decree, for default of appearance, neither party having appeared on the day fixed for hearing will not operate as *res judicata* so as to bar hearing of similar objections to a subsequent application to execute the same decree. A.W.N. (1895) 15.

Service of notice.—Mere service of notice on the judgment-debtor does no amount to *res judicata*. 10 W.R. F.B. 8 ; 3 C. 518 ; 15 O.W.N. 661 ; 2 M. 1 ; 35 C. 100 ; 22 B. 89 ; 11 Bom. L.R. 1281 ; 14 O.W.N. 114 ; 105 P.R. 1882 ; 10 W.N. 22 ; 18 O.C. 374 ; 13 O.C. 90. If the judgment-debtor had no opportunity to contest the validity of the previous order it is not *res judicata*. 29 M.L.J. 89=21 I.C. 782 ; 94 I.O. 144 ; 15 O.W.N. 661=14 M.L.T. 530 ; 12 C.L.J. 312 ; 200 P.R. 1889 ; 27 C. 210 ; 13 O.C. 90 ; 33 I.C. 445 ; 5 I.C. 89=14 O.W.N. 433. If the order has been improperly made against the decree-holder and is not detrimental to the judgment-debtor, the question becomes *res judicata* even though such order was passed without notice to the judgment-debtor. An order in execution between the parties to the suit passed *ex parte* after notice which the Court considered sufficient service operates as *res judicata* in subsequent stages of the execution proceedings. 37 M. 462 ; 8 C. 51 P.O. ; 23 C. 354 ; 24 M. 669 ; 4 W.N. 39 ; 2 W.N. 151 ; 47 P.R. 1906 ; 4 P.R. 1886 ; 17 O.L.J. 125 ; 16 A. 390 ; 24 A. 282 ; 13 A. 211 ; 15 W.R. 67 ; 18 O.C. 374 ; 143 P.R. 1882 ; 10 W.R. 8 F.B. ; 37 I.C. 66 ; 19 B. 261 ; 16 I.C. 238 ; 9 C. 65 ; 6 B. 54 ; 50 I.C. 972 ; 20 O.L.J. 15 ; (1914) M.W.N. 80 ; 22 I.C. 899 ; 27 P. L. R. 1905 ; 15 A. 84 ; 40 M.L.J. 556=14 O.W.N. 114 ; 68 I.C. 397 ; 37 M. 462. When the judgment-debtor ought to object to the execution application on the ground of illegalities in relation to execution proceedings, e.g., non-service of notice on the transferor under O. 21, r.16, he cannot take such objection when a subsequent application for execution is made. 24 C. 199 ; 57 I.C. 707. When service of notice has not been made in accordance with law, the judgment-debtor is not barred from contesting the application as being time barred. 32 I.C. 744. Notice is essential for constructive *res judicata* in execution. 13 O.L.J. 26=9 I.C. 213 ; 40 M. 1016 ; 56 I.C. 801=31 O.L.J. 382 ; 62 I.C. 480=13 L.W. 289 ; 26 M.L.J. 83 ; 21 I.C. 782 ; 37 M. 314 ; 27 I.C. 225=18 O.W.N. 1288 ; 37 I.C. 66 ; 30 M. 255. An order against the decree-holder without notice to the judgment-debtor returning the execution application for amendment by reducing the amount, is a judicial adjudication and the decree-holder is not entitled to a larger amount. Absence of notice to the judgment-debtor is immaterial except when the order is passed against him in which case the *ex parte* order cannot bind him. 37 M. 374. Orders passed in execution department are binding on parties even if invalid, if they are passed after notice to them and no steps are taken to set the orders aside by appeal or otherwise. 139 P.L. R. 1905. When the matter was decided without notice to the other party, there is no *res judicata*. 44 C. 954 ; 54 I.C. 933 ; 26 M.L.J. 83=21 I.C. 782 ; 62 I.C. 480=13 L. W. 287 ; 34 A. 518 ; 4 I.C. 1141=5 M.L.T. 293 ; 4 I.C. 478=9 S.L.R. 133.

4. THE COURT WHICH DECIDED THE FORMER MATTER IN DISPUTE MUST HAVE BEEN A COURT OF COMPETENT JURISDICTION TO EXECUTE THE DECREE.—The order of a lower Court cannot operate as *res judicata* against the decree-holder proceeding in execution on the strength of a superior court's order passed later on by virtue of an appeal from an order prior in date to the first mentioned order. 35 B. 245. An order of attachment on the application of a decree-holder made after service of notice on the judgment-debtor cannot be set aside by the successor in office of the Judge who passed the prior order. 18 I.C. 841=17 O.L.J. 125. A decision is not binding on the appellate Court on an appeal from a final order in the same proceedings even if the interlocutory order had not been immediately appealed against. 89 P.R. 1894 ; 43 P.R. 1888 ; 11 I.C. 216.

THE FOLLOWING MATTERS MAY BE HELD TO BE *RES JUDICATA* IN EXECUTION PROCEEDINGS.

THE JURISDICTION OF THE COURT TO ENTERTAIN AN APPLICATION FOR EXECUTION.—The finding that the court has no jurisdiction to entertain the application for execution because the judgment-debtor had been declared an insolvent acts as *res judicata* for a subsequent application for execution. 27 A. 148 (Approved in 3 S.L.R. 188). If a court has jurisdiction in a certain matter, an irregularity should be considered, covered and cured by the assent of the party. Where jurisdiction exists over the subject-matter, requiring only to be invoked in the right way, the party who has allowed the court to exercise it in a wrong way cannot be permitted to afterwards turn round and dispute the legality of the proceedings due to his own intention or negligence. 11 B. 153 (followed in 17 B. 164).

EX-PARTE ORDERS.—An *ex-parte* dismissal of objections to execution, or an *ex-parte* order operates as *res judicata*. 33 I.C. 443 = (1916) 2 M.W.N. 64. *Ex parte* execution by the decree-holder when allowed, has the effect of *res judicata*.

EXECUTION IS TIME BARRED OR NOT.—The question whether execution is time barred or not operates as *res judicata*. 17 O.W.N. 113 = 10 I.C. 359 ; 14 Bom. L.R. 264 = 14 I.C. 977 ; 44 B. 227 ; 45 I.C. 404 ; 41 I.C. 675 = 3 Pat. L.W. 13 ; 54 I. C. 725. When after receipt of notice under O. 21, r. 22, the judgment-debtors filed objections, as to bar of limitation, but on the day fixed for hearing them, did not appear and the objections were dismissed for default, they were estopped from pleading in a subsequent application for execution of the decree that the former application was barred by limitation at the time it was made. 24 A. 282, followed in 31 O. 822 ; A. W. N. (1905) 237 ; A. W. N. (1906) 70. Though the execution of a decree may have been barred at the time of the application an order for execution if regularly made by a competent court having jurisdiction to try the question is valid if unreversed. 8 O. 51 P.C. ; 47 P.R. 1906 ; (Applied in 6 B. 586 ; 8 A. 492 ; 13 A. 564 ; 3 Bom. L.R. 416 ; 24 A. 282.) When an order for execution has been made by a competent court on a previous application for execution after due notice to and without any objection by the judgment-debtor, it could not afterwards be pleaded on a subsequent application that the previous application was time barred. 47 P.R. 1906 ; 26 M. 669 ; 23 O. 374 ; 44 I.C. 4 ; 8 O. 51 ; 16 A. 390 ; 18 O.C. 374 ; 47 I.C. 151 ; 44 M. 227 ; 45 B. 453 ; 1923 C. 322. If an executing court holds rightly or wrongly that a decree is executable even after the 12 years have elapsed and orders execution to issue and the judgment-debtor does not challenge the order by way of appeal, review or revision, the order is binding on him and on principles analogous to those of *res judicata* he is precluded from challenging the order at a subsequent stage of the proceedings. 60 I.C. 905 (N) ; 66 I.C. 751 ; 72 I.C. 473. An unappealed and hence final order deciding that an execution application has been barred by limitation will operate as a bar to execution upon a subsequent application for execution of the same decree. 9 C. 65. A decision on an application to execute a decree that the application is barred by limitation does not operate as *res judicata* in a subsequent application to execute the decree. 46 B. 467 ; 21 Bom. L.R. 344 ; 67 I.C. 879. An order declaring execution barred as to maintenance for a certain period is no bar to execution for a later period as *res judicata*. 18 M. 482 ; 30 M. 504 ; 18 M.L.J. 548. The dismissal of an objection by the judgment-debtor to the execution of a decree on the ground of limitation is not *res judicata* when it was struck off without any judicial determination. 10 O.W.N. 209 ; 3 I.C. 47. So long as an application for execution is pending the judgment-debtor can at any time show that it is barred by limitation and the court has to dismiss it under S. 3, Limitation Act. It is only when the point of limitation is concluded by proceedings in a previous execution application that the judgment-debtor is not allowed to take objection on the score of limitation in a subsequent execution of the decree. 53 I.C. 85 = (1920) Pat. 109 = 2 Pat. L.T. 22. When the court after the service of notice on the judgment-debtor, to show cause why

the decree should not be executed makes an order for execution, by attachment of property, the court is thereby deemed to have decided whether rightly or wrongly that the execution was not then time barred, and accordingly the judgment-debtor is precluded (in subsequent proceedings) to show that the previous execution application was in fact time barred. 14 A.L.J. 370; 10 I.O. 432; 21 O.W.N. 945=37 I.O. 66; 26 M.L.J. 255=23 I.O. 390; 19 B. 261; 16 I.O. 238; 9 O. 65; 6 B. 54; 20 C.L.J. 15; (1914) M.W.N. 180; 22 I.O. 899; 27 P.R. 1905; 1905 W.N. 237; 15 A. 84 F.B.; 24 A. 282; 14 O.W.N. 114; 37 I.O. 443; 18 O.O. 374; 16 A. 390; 10 O.O. 359. If the execution order is regularly made by a competent court such order is tantamount to an implied adjudication that the execution application was not then time-barred and the judgment-debtor is precluded from showing that in fact the order was made under the circumstances when the execution application was time barred. 8 O. 51 P.O.; 6 B. 54; 15 A. 84 F.B.; 18 O.O. 374; 13 O.O. 90; 10 I.O. 359.

RIGHTS OF APPLICANTS TO EXECUTE is a matter that has the force of *res judicata*. 59 I.O. 161=12 L.W. 34. When the beneficial owner of the decree applied for execution under O. 21, r. 16, and notice was issued to the judgment-debtor who did not raise any objection, he was held to be barred from questioning the title of the former to execute the decree. 38 A. 289; 23 I.O. 286=12 A.L.J. 206; 80 I.O. 722=22 A.L.J. 928; 47 A. 286. When the judgment-debtor did not object to the substitution of the decree-holder in a previous proceeding he cannot subsequently put in such objections to execution. 3 O.L.J. 499. A judgment-debtor who once acquiesced in the execution of a decree cannot subsequently object to the execution thereof. 62 I.O. 292=10 L.B.R. 280. An application by the judgment-debtor for the postponement of an execution sale would not amount to an estoppel under S. 115 of the Evidence Act so as to preclude him from maintaining that execution of the decree is barred by the lapse of time. 10 C. 196 P.O. When a question has been tried and determined under S. 47 it cannot be reopened under S. 276 old Code (S. 64 of the new Code) merely because the assignee from the judgment-debtor has been made a party. It is *res judicata*. 4 I.O. 119=9 C.L.J. 356 (6 A. 269 followed). An order passed in execution after notice to the judgment-debtor after transfer of his interest is not *res judicata* against his transferee. 21 I.O. 939. Where the judgment-debtor does not object to the first application for execution, on the ground of illegality, he cannot take such objection on a subsequent application for execution. 5 Pat. L.J. 639. Where the decree-holder's application for execution is dismissed on the ground that no opportunity was afforded to the judgment-debtor to satisfy the decree, a second application after an opportunity is so offered is not barred as *res judicata*. 21 C. 784.

SALE.—An order allowing sale acts as *res judicata*. Sale of a certain property as being non-ancestral operates as *res judicata*. A decision that certain properties are liable to sale can be *res judicata* at a subsequent stage. 45 I.O. 699. A decision that a certain property is exempt from sale is *res judicata* in a subsequent suit. (1922) M.W.N. 793=31 M.L.T. 219 P.O. When in a proceeding to set aside a sale the applicants set up the case that the person whose property purported to have been sold and whose legal representatives they were, had died before the decree and did not put forward the case upon which they later on sued to set aside the sale, viz., that the judgment-debtor died after the decree but before attachment, held that the suit was barred by the rule of *res judicata*. 23 O.W.N. 608=51 I.O. 972. If a tenant judgment-debtor omits to raise an objection as to the non-transferability of a holding in an execution proceeding in which the holding is attached he is estopped from raising it in a subsequent execution proceeding of the same decree. 49 I.O. 790. It is not competent to a judgment-debtor under a decree for sale of a cultivatory holding in enforcement of a mortgage lien, on an application made for execution of the said decree, to raise for the first time an objection that the holding is an occupancy holding. Such an objection should have

been raised in the suit. A.W.N. (1899) 5 ; 27 A. 684 F.B. A judgment-debtor who might have raised objections to a sale in execution of a decree against him or who might have appealed against the order for sale but who refrains from doing so, has no right after the sale has been carried out to prefer an objection that the property sold was not legally saleable. 79 I.O. 106. A decision that a certain land is liable to attachment and sale is conclusive and acts as *res judicata* in subsequent proceedings. 4 I.O. 478—9 S.L.R. 193 (8 O. 51, 6 B. 64 ; 19 M. 54 ; 27 A. 148 followed). That properties should be sold in a certain order acts as *res judicata*, 5 I.O. 210—7 A.L.J. 401 ; A.W.N. (1891) 33. A judgment-debtor is precluded from objecting to a sale on a ground which he might have raised but, did not raise against the order which was made by the Court. 5 O.C. 251 (B).

Sale proclamation.—Where a judgment-debtor is duly apprised of the date fixed for settling the details of the sale proclamation he is debarred from urging successfully in an application to set aside a sale that the value entered in the sale proclamation was inadequate. 78 I.O. 727. When in spite of notice to the judgment-debtor, he did not attend at the settlement of a sale proclamation under O. 21, r. 66, he cannot by reason of such non-attendance be estopped by principles of *res judicata* from objecting to the valuation afterwards. 74 I.O. 838—4 Pat. L.T. 721. When at one stage an objection to the absence of proclamation was taken, but rejected, the point is not *res judicata* on an application to set aside the sale under O. 21, r. 90 and the Court ought to take evidence and decide afresh. 46 M. 736. Where the objections of the judgment-debtor in the proclamation of sale were set aside they do not act as *res judicata* in an application to set aside the sale, as there is no provision of law authorising the investigation of objections in question before the conclusion of the sale. 46 M. 736. Proceedings under O. 21, r. 66, are of a non-judicial or quasi judicial character and any decision come to in those proceedings cannot operate as *res judicata* on the point raised in a regular suit. 78 I.O. 582 (A.). Where in an application for execution by way of sale of certain properties the Court ordered attachment of the property and issue of notice to the judgment-debtor for settlement of the sale proclamation, and in spite of the judgment-debtor's objection to such execution ordered the issue of proclamation in his presence but did not in express terms pass any orders for sale or decide that execution could be enforced by sale, *held* that the order of the Court would not operate as *res judicata* on the question of the decree-holder's right to execution by sale of the property so as to estop the judgment-debtor from raising the same question on a subsequent application for execution by way of sale of the same property. 45 C. 530. When a decree-holder having put up certain properties of the judgment-debtor to sale in execution, bid at the auction at Rs. 600 but failed to deposit the earnest money and then applied to withdraw the execution and the Court being of opinion that this was a dodge to avoid paying the earnest money allowed the application, but subject to the condition that the same property should be put up for sale first at the next application for execution and the decree-holder must bid for it *held* that the order of the Court did not act as *res judicata*. 11 C.W.N. 236. When the Court refused to confirm the execution sale owing to the absence of the receipt, but at the same time directed that the decree-holders should not have power further to execute their decree, on a further application for sale, it was objected by the judgment-debtor that the previous order of the Court operated as *res judicata* ; but it was *held* that the order thus relied on was superfluous and not warranted by any issue then before the Court and did not operate as *res judicata*. A.W.N. (1895) 119. An order that the property cannot be sold is no bar to the attachment of the same. 25 C. 262.

RIGHT TO INTEREST.—When the judgment-debtor allowed several applications for execution of the decree against him to be made in which the decree-holder treated the decree as bearing interest and orders were passed by the executing Court in

accordance with these applications, the judgment-debtor could not on a subsequent application for execution being made, object that no interest was payable under the decree. A.W.N. (1901) 32. But see 17 M.L.J. 311. Where rate of interest was once fixed in execution proceedings as payable on the amount of decree it could not be questioned by the judgment debtor in subsequent proceedings. 12 M.L.J. 97. When a decree-holder claimed in execution, interest not awarded by the decree and then, the debtor not objecting, got an order in his favour that will not operate as *res judicata*, specially if the notice of prior execution did not mention the claim for interest. 17 M.L.J. 311. When in reference to an application for execution of a decree a Court made an order construing the decree to award interest at a certain rate till payment, no contrary construction could be placed on the decree in a subsequent application in the execution proceedings. 7 A. 102 P.O.; 6 A. 269 P.C.; 19 M. 54.

DECISION AS TO MESNE PROFITS.—An order as to the liability of the defendant to pay mesne profits and the amount of the mesne profits payable acts as *res judicata*. 51 I.O. 98=29 C.L.J. 245; 37 I.O. 997; 50 I.O. 262=29 C.L.J. 470; 5 I.O. 387=11 C.L.J. 501.

INTERPRETATION.—A certain interpretation put on the decree operates as *res judicata*. 16 M.L.T. 399. When a decree has been interpreted in a particular sense as between the parties that interpretation has the force of *res judicata* and the subsequent amendment of the law has no effect on this question. 32 A. 210. Although a decree does not in terms give a certain relief, yet if it is construed to give a certain relief, it is not competent to the Court, on a subsequent application to treat the order as erroneous and put another construction on the decree. 19 M. 54 (followed in 20 M. 289; 24 M. 683). A construction put upon a decree in previous execution though erroneous is binding and no contrary construction can afterwards be placed upon the decree. 6 A. 269 P.C.; 7 A. 102 P.O.; 19 M. 54; 96 M. 553; 48 P.R. 1900 37 M. 314; 23 I.O. 390 (M.); 14 I.O. 264 (M.); 30 I.O. 523 (A.).

PAYMENT OR ADJUSTMENT.—When in execution of a decree, the payment of the debt was alleged and brought to the notice of the Court by the judgment-debtor within 90 days of the alleged payment, and the Court going into objection found against the judgment-debtor *held* that a suit by the judgment-debtor for a declaration that he had paid the amount alleged by him was barred by the rule of *res judicata*. 91 P.R. 1912. The order dismissing the judgment-debtor's application under para 2 of r. 2 of O. 21 for certification of payment made by him to the decree-holder in satisfaction of the decree does not act as *res judicata* and the decree-holder is not prevented from certifying the payment to the Court under para (1) of the rule. 89 I.O. 195=1925 P. 822.

ARREST.—A previous order of arrest is *res judicata*. 12 A.L.J. 206=23 I.O. 286.

QUESTIONS OF SUBSTANTIVE LAW AND PROCEDURE.—Where substantive rights are decided in an order passed in execution proceedings, such a decision is *res judicata* in subsequent execution applications. But when the decision on the previous application was one on a question of procedure as it then stood, it does not operate as *res judicata* when that procedure itself is changed by the statute law. 39 M. 923.

ATTACHMENT.—An erroneous decision that an attachment was subsisting is *res judicata* in a further proceeding in the same matter seeking to revive the former proceedings in execution. 36 M. 553. A decision that a property is not liable to attachment is final and operates as *res judicata*. 44 I.O. 654=4 Pat. L.W. 279. If a property was not liable to attachment in execution of one decree on the ground that it did not belong to the judgment-debtor, it was equally not liable to attachment in execution of another decree. 101 P.R. 1915. Previous improper attachment of property does not act as *res judicata*. 95 P.R. 1906. When the court rejected the

application for the removal of the attachment at a time when there was no subsisting attachment at all an application for removal of the second attachment effected, of the same property is not barred as *res judicata*. 7 B. 408; 13 B. 72. When in spite of notice to the judgment-debtor he did not attend at the settlement of a sale proclamation under O. 21, r. 66, he cannot by reason of such non-attendance be considered to be estopped by the principle of *res judicata* from contending thereafter that the property was not liable to attachment. 46 M. 768. When a judgment-debtor objected to an attachment of certain property but by mistake omitted to mention in his objection certain houses in respect of which he filed another objection before sale, it was held that the judgment-debtor could make the second objection and S. 11, C. P. Code, was no bar to such objection. 2 I.C. 105. An order disallowing attachment acts as *res judicata*. 44 I.C. 4=(1918) M.W.N. 143.

ALLOWING OR DISALLOWING EXECUTION.—Where successive applications for execution of a decree are allowed by the Court without any objection being taken by the judgment-debtor regarding the validity of the decree it is not open to him in a subsequent proceeding to contend that there is in fact no decree which can be executed, 48 I.C. 245=4 Pat. L.J. 213; 72 I.C. 397=45 M.L.J. 71. An order rejecting an application on the ground that it was not in accordance with law is final and *res judicata*. 72 I.C. 473=1923 N. 236. An order after notice to the judgment-debtor for execution is *res judicata* even though the application is subsequently dismissed for default. 4 Pat. L.T. 204=1923 P. 180; 68 I.C. 239; 68 I.C. 337. An order allowing execution is *res judicata*. 24 A. 282; 15 A. 198; 3 C.L.J. 240; 32 I.C. 1005; 33 I.C. 443; 48 P.R. 1900; 23 I.C. 286; 10 I.C. 359. The order of a Court directing execution of a barred decree to proceed after due notice to the judgment-debtor precludes the latter from raising the plea of limitation in another subsequent execution of the decree. 41 I.C. 675=3 Pat. L.W. 13; 68 I.C. 267=25 O.C. 13; 1922 A. 100=66 I.C. 751; 67 I.C. 56. When an execution application is allowed without the judgment-debtor contending that it is time barred, he cannot in a subsequent proceeding in execution reargue the question that the prior application was barred. 2 Pat. 759=74 I.C. 130. When an application for execution of a lower Court decree, instead of the final appellate court decree, is made and allowed without objection by the judgment-debtor, it is *res judicata* in a subsequent proceeding. 44 A. 350. Dismissal of execution application will operate as *res judicata* when such a dismissal in execution proceedings is based on an adjudication of the rights litigated between the parties and the fact that some other ground was added as a cause of dismissal does not take away such effect of the order. 12 M.L.J. 24. An order granting execution of a declaratory decree whether rightly or wrongly is final when passed after notice to the judgment-debtor and an objection to the subsequent application for execution cannot be entertained. 21 M. 683. When objections to execution were overruled by a Court and the order was that the decree should be executed, it became conclusive in the absence of any appeal. 20 C. 551; 5 W. R. Mis. 14. Where execution of a decree for custody of wife was refused on the ground that her conversion to christianity dissolved the marriage, and the decree-holder applied again for execution contending that the marital rights revived by her reconversion to Muhammadanism the words debarred such construction even though the order might be wrong. 59 P.W.R. 1910=6 I.C. 665; (85 P.R. 1906 followed). When an order is made for execution, the bar of limitation cannot be pleaded in a subsequent application for execution. 24 M. 669; 31 C. 822; A.W.N. (1905) 237; 6 B. 54; 13 A. 568. An order holding that a mortgage decree is executable as it stands without the necessity of an application under O. 34, r. 6 acts as *res judicata*. 42 I.C. 282=(1917) M.W.N. 845. When a decree-holder applied for possession and mesne profits but he was allowed possession only, a subsequent application for mesne profits was allowed. 24 M. 681. An *ex parte* order allowing a previous application for execution as not time barred, without notice does not bar the judgment-debtor from showing that

it was barred. 24 I.O. 80=18 O.W.N. 1283. When a judgment-debtor did not take exception to the amount set forth as being due on the decree in an application for execution held that he was not prevented by the rule of *res judicata* from afterwards raising the question. 37 A. 589. When the application is struck off merely because " *talbana* " has not been paid or because some other step is not taken, the order does not bar a further application, A.W.N. (1889) 163. An order refusing an application for execution acts as *res judicata*. 47 I.O. 154=(1918) Pat. 265.

Rejection.—The rejection of an application for execution is not an adjudication within the rule of *res judicata*. 6 O. 209 ; 8 O. 47 ; 1 Hay. 515, (not followed in 14 O.W.N. 114=39 O. 47).

Personal decree with a decree for sale.—When a combined decree under Sec. 88, and 90, T.P. Act, has been passed, it is not necessary to apply for a personal decree after a sale of the hypothecated property. If such an application is made, an order passed on that is without jurisdiction and cannot supersede the decree as originally made and cannot operate as a bar to the decree being executed. 29 A. 11. When an order was made without notice to the judgment-debtor, and without knowledge on his part that execution proceedings were pending against him, it does not operate as *res judicata*. 5 I.O. 89. A decree-holder who has once applied for execution of the decree as a rent decree seeking to bring the tenure to sale is not debarred from executing it as a money decree if the decree is ultimately held to be a money decree. 1 Pat. L.W. 582=39 I.O. 737. An order disallowing objections by the judgment-debtor acts as *res judicata*. 64 I.O. 724.

DISMISSAL FOR DEFAULT.—Dismissal of an application for execution does not act as *res judicata*. 83 I.O. 443=(1916) 2 M.W.N. 64 ; 10 I.O. 359=17 O.W.N. 119 ; 68 I.O. 397 ; 64 I.O. 209=24 O.C. 218 ; 14 Bom. L.R. 261. Dismissal of the application for execution for non prosecution does not act as *res judicata*. 67 I.O. 669. When an order has been made on an application for execution which determines the rights of the parties to the proceedings, the fact that the execution case is struck off does not entitle any party to question the previous adjudication. 63 I.O. 239=1928 N. 1.

ORDER AS TO AMENDMENT.—An order to amend an execution application by amending the amount due to the decree-holder in accordance with the calculation adopted by him in a previous application, is binding on the decree-holder unless set aside in appeal even when no notice was issued to the judgment-debtor. 18 I.O. 607=24 M.L.J. 26.

LEGALITY OF THE ORDER.—The legality of previous proceedings cannot be questioned in subsequent proceedings. A.W.N. (1882) 151.

TRANSFER OF THE DECREE.—Where a decree was assigned and an application was made to the Court to recognise the assignment, and transmit the decree for execution to another Court the omission of the judgment-debtor to object at that stage does not preclude him from objecting to the execution of the decree in the manner proposed by the decree-holder at a later stage of the execution proceedings. 73 I.O. 213=32 M.L.T. 157. It is not necessary to issue notice on application for transfer of the decree for execution, and omission of judgment-debtor on such occasion to appear and object to execution does not bar him from contesting this point afterwards. 15 O.W.N. 661.

GROUND NOT SET UP IN THE SUIT.—When the plea set up in execution proceedings could be set up in the suit, but it was not one that ought to have been raised, the plea in the suit itself would not bar him from setting up such claim anew in the proceedings in execution. 16 M. 117.

NOTICE.—Notice to the judgment-debtor without inserting the specific prayer, when the application is not for execution of something which has been directed to be done by any decree or order will not render the order made upon such an application *res-judicata*. 5 M.L.T. 293. When a party to an execution proceeding allows an order to be made against him at one stage of the proceedings, when he had an opportunity to contest the validity of the order, he cannot be permitted at a subsequent stage of the proceeding to re-open the whole matter in controversy. 8 I.C. 22.

SETTING ASIDE SALES.—Where in execution of a decree against several judgment-debtors a certain property was attached and sold as that of one of the judgment-debtors, and the others though they had knowledge of the proceedings and were present at the sale raised no objections whatever and even allowed the sale to be confirmed they were estopped subsequently to set aside the sale by their conduct. 9 O. L.J. 191=67 I.C. 797.

ORDERS ALLOWING DELIVERY OF POSSESSION.—Such orders act as *res judicata*. 54 I.C. 924.

CHAPTER XV.

RESTITUTION.

APPLICATION FOR RESTITUTION.—(1) Where and in so far as a decree is varied or reversed the Court of first instance shall, on the application of any party, entitled to any benefit, by way of restitution or otherwise, cause such restitution to be made as will, as far as may be, place the parties in the position which they would have occupied, but for such decree or such part thereof as has been varied or reversed; and for this purpose, the Court may make any orders including orders for the refund of costs, and for the payment of interest, damages, compensation, and mesne profits which are properly consequential on such variation or reversal.

(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub-section (1). (S. 144.)

LEGAL CHANGES.—The corresponding S. 583 of the old Code of 1882 ran as follows:—When a party entitled to any benefit (by way of restitution or otherwise under a decree passed in an appeal under this chapter, desires to obtain execution of the same, he shall apply to the Court which passed the decree against which the appeal was preferred, and such Court shall proceed to execute the decree passed in appeal according to the rules hereinbefore prescribed for the execution of decrees in suits. 1.—Sub.-S. 2 is new. The decisions under the old Code were not uniform as to whether a suit lay or not in respect of restitution. This section provides expressly that no separate suit should be brought in respect of the matter dealt with in this section; under the old Code some authorities held that restitution came under S. 47, O. P. Code, and hence no suit lay; others held that S. 47 did not govern this section and a suit lay for the recovery of property. 10 P.R. 1914; 29 A. 348; 95 O. 265. The present section omits all reference to execution. 2.—Under the old Code the proceedings had to be commenced by an application for execution of the appellate decree under the present Code it is no longer so. Any order under this section amounts to a decree. See S. 2 (2), definition of "decree." Under S. 583 of the old Code an application for restitution was a proceeding in execution of the appellate decree. 29 I.O. 380; 41 B. 625. 3.—The old section applied only when the decree of reversal was a decree passed in first or second appeal; cases of appeals to the Privy Council or review or revision were not provided for. Under the present section all such cases are covered. Provided the decree is varied or reversed the section applies, however the reversal or variance has been effected. 65 I.O. 797 = (1922) M.W.N. 186; 40 M. 299; 46 M. 893; 53 I.O. 552 = 13 S.L.R. 153; 28 A. 665 (old law); 31 A. 364 (old law); 33 I.O. 739 = (1916) M.W.N. 155. 4.—The language of ol. (1) is wider than that of the corresponding S. 583 of the old Code and the addition of ol. (2) barring suits necessarily implies the widest possible construction of ol. (1). 17 S.L.R. 73 = 80 I.O. 1002.

SCOPE AND OBJECT.—The word restitution in this section means restoring to a party what he has lost in execution of a decree passed against him, on the decree being varied or reversed. 23 M. 306 ; 55 I.C. 356. The principle is that a party who received the benefit of the erroneous decree must make restitution to the other party for what he had lost. The parties must be restored to the same position that they were in, at the time when the latter was deprived of the property. "They will by reason of an act of the Court have paid a sum which now it is ascertained, was ordered to be paid by mistake or wrongly. They will recover that sum after the lapse of a considerable time, but they will recover it without the ordinary profits which are derived from enjoyment of money. On the other hand, these fruits will have been enjoyed or may have been enjoyed by the person who by mistake obtained possession of the money under a judgment which has been reversed. So far therefore as principle is concerned their Lordships have no doubt or hesitation in saying that injustice will be done to the petitioners and that the perfect judicial determination, which it must be the object of all Courts to arrive at, will not have been arrived at, unless the persons who have had their money improperly taken from them and have their money restored to them with interest during the time, that the money has been withheld" L.R. 3 P.C. 465 ; 23 C. 923 ; 9 W.R. 402 ; 4 L.L.J. 333=68 I.C. 807 ; 6 C.W.N. 710 ; 22 W.R. 435 ; 1898 P.J. 335. The section gives legislative recognition to the practice followed by Courts under their inherent powers. But the practice was not uniformly followed. 13 B. 485 ; 21 C. 989 ; 18 A. 262 ; 3 C.W.N. 38 ; 32 A. 79 ; 3 C. 161 ; 173 P.C. ; 20 A. 430 ; 9 M. 506 ; 35 B. 285 ; 13 B. 485 ; 14 C. 484 ; 11 M. 261 ; 24 M. 341 ; 21 A. 1 ; 31 A. 551 ; 32 A. 79 ; 12 C.W.N. 642 ; 9 C.W.N. 381 ; 13 B. 45 ; 23 M. 306. This section is imperative in its terms and does not give the Court any discretion in the matter. 6 L.W. 568=42 I.C. 523 ; 27 M. 504 ; 23 M. 306. This section was enacted with a view to shorten litigation and afford a speedy relief. 16 C.L.J. 135=17 I.C. 121. This section provides a more convenient procedure. A party who cannot get a relief by a suit cannot get the same relief under S. 144, C.P. Code. 16 C.L.J. 83=16 I.C. 966. S. 144 has no application to a case where the properties of which possession is sought by way of restitution were never in the possession of the applicant and were never taken out of his possession and made over to the opposite party under any decree or order of the Court. 51 C. 324. The section applies only to cases where a decree or order is varied or set aside. 39 I.C. 653=2 Pat. L.J. 206. It is not necessary that restitution may be provided for in the decree itself. 21 C. 989 ; 21 C. 340 ; 32 A. 79 ; 42 A. 158 ; 4 I.C. 376 ; 29 I.C. 380. There is a necessary implication in the decree for restitution, 42 A. 158. Restitution, when possession is obtained otherwise than in execution may be made under the section, when it is made under colour of execution. 42 A. 568 but not when possession is obtained independent of and in opposition to the decree, 39 I.C. 933.

NATURE OF PROCEEDINGS UNDER S. 144.—Proceedings under S. 144, C.P. Code are not proceedings in execution. Consequently S. 141 of the Code applies to them, 44 A. 407 (*contra* in 40 M. 780). Proceedings under S. 144 are not proceedings in execution, although they are in the nature of proceedings in execution to enforce directly or indirectly the final decree. The section is very wide in terms and the word party does not mean party to the suit but party to the application. 44 A. 555. A proceeding for restitution under S. 144, C.P. Code is neither a suit nor a proceeding in execution. It is a miscellaneous proceeding to which the rules applicable to execution proceedings do in substance apply. The provisions of O. 2, r. 2 are not applicable to such proceedings. 3 Pat. L.J. 367=47 I.C. 47. An application under S. 144, C.P. Code is not in the nature of an application to execute any decree, and therefore Art. 181 of the Limitation Act applies to such an application. 30 I.C. 680=8 Bur. L.T. 165. An application for restitution is in substance an application for execution though the rules of O. 21 may not apply ; consequently Art. 182 of the Limitation Act applies

to such applications. 72 I.O. 912—(1923) Pat. 1. An application for restitution under S. 144, C.P. Code, is an application for the execution of a decree. 44 B. 1137; 1926 O. 199—29 O.C. 23.

APPLICABILITY.—S. 144 does not apply to a refund of purchase money by the purchaser when the sale is set aside. 42 M.L.J. 308=67 I.C. 369; 26 I.O. 890—19 O.W.N. 1167; 41 M. 667 (an order under O. 21, r. 90). S. 144 does not apply for recovery of possession when possession is taken not under the decree but merely with the aid of the police in opposition to the decree. 6 L.W. 631=39 I.O. 983. S. 144 applies in the case of upper Burma Land and Revenue Regulation (III of 1889) and authorises Courts to order restitution. 46 I.O. 475=11 Bur. L.T. 3. When an ejectment decree is passed by a Revenue Court and duly executed but afterwards the decree was reversed in appeal any application for restitution must be made to the Revenue Court, as the Court of first instance. No separate suit is maintainable in respect thereof. 44 A. 288 46 I.O. 475=11 Bur. L.T. 3; (26 A. 149, A suit also lies for refund). When the decree-holder obtained possession of the property decreed without intervention of the Court and the decree was reversed in appeal the remedy of the judgment-debtor was held to be an application under this section. 27 A. 348; 21 I.O. 84; 42 A. 568. An application for restitution in a suit for ejectment under the Agra Tenancy Act, on the reversal of the decree by the Civil court on appeal must be made to the Revenue Court which tried the original suit and not to any civil court. 65 I.O. 798=20 A.L.J. 189.

Land Acquisition cases.—If the amount of compensation awarded to the claimant is reduced in appeal or otherwise, the amount over paid may be refunded under this section. 35 B. 255.

WHO MAY APPLY FOR RESTITUTION.—Any party entitled to any benefit by way of restitution may apply under this section. 78 I.O. 997. Any party means any person against whom the decree was passed though he was not a party to the appeal under O. 41, r. 4 provided that the appeal is in effect and substance in favour of such person 12 O.W.N. 642; 18 M.L.J. 39; 20 A. 493. The word party is used to mean party to the application and not party to the suit. 44 A. 555. Restitution can be obtained by a person who was not impleaded as a party at the time of the decree of the trial court. 46 I.O. 465=5 Pat. L.W. 149; 33 O. 857. A transferee of a decree passed in appeal has a right to apply. 33 O. 857; 78 I.O. 997. Where the assignment has taken place even after the appellate decree which is the basis of the claim, the assignee is entitled to the benefit of the section. 46 I.O. 465=(1918) Pat. 343. An attaching creditor is not the representative of the decree-holder. 29 O.L.J. 360. A surety who has paid is entitled to apply, but not the debtor even though he may have repaid the surety. 30 P.J. 1898. The word "parties" includes the heirs and representatives in interest of the original parties. 65 I.O. 797=(1922) M.W.N. 186; 25 M. 426. A person who has got less on a rateable distribution may get by way of restitution his proper share from a person who realised the same. 27 M. 504. Where two persons are rival claimants to some money deposited by a third person in Court during the pendency of the suit and on a decree being passed in favour of one claimant, he obtains the money and the decree is set aside on appeal, the rival claimant can claim restitution and not the third person who deposited the same, when the appeal was filed by the rival claimant. 4 M.L.J. 1. A transferee of a portion of a holding who was not made a party to a rent suit, on whose application the sale in execution of the rent decree was set aside, cannot apply for recovery under this section, of mesne profits for the period for which he was out of possession. 16 O.L.J. 83. The section does not apply to a case where the property of which possession is sought by way of restitution was never in the possession of the applicant and was never taken out of his possession. 51 O. 324.

AGAINST WHOM RESTITUTION MAY BE CLAIMED.—The holder of the decree that is reversed or altered is liable. If the decree-holder buys property under the decree which is reversed he is bound to restore it. 5 M. 206.

Transferee of a decree reversed in appeal or otherwise.—Under the old Code such a person was not liable as the restitution was to be claimed by execution of the appellate decree, and the transferee was not a party to the appeal. 20 A. 139; 19 A. 136; 5 C.W.N. 426; 28 A. 337; 24 A. 288. Contrary was held in 28 M. 203; 24 A. 288; 38 M. 36; 17 I.O. 420=23 M.L.J. 513 under the old Code. The view taken by the Madras High Court is good law now. 38 M. 36; 33 C. 857. A purchaser during the pendency of an appeal from the decree must be deemed to have purchased it subject to the result of the appeal and is liable under this section. 28 A. 337. The purchaser is not in a better position and is liable to restore. 72 I.O. 912=1923 P. 371. A stranger *bona fide* purchaser at an auction-sale is not liable to restore. 75 I.O. 238=L.R. 4 A. 526; 79 I.C. 636=20 N.L.R. 170; 80 I.O. 1002=17 S.L.R. 73; 38 A. 240; 16 O.C. 225=21 I.O. 570; 34 I.C. 760=30 M.L.J. 497; 79 I.O. 57; 46 I.O. 148; 28 A. 337; 80 I.O. 1002. A decree-holder purchaser is liable. 5 M. 206.

Trustee.—When a person sued as a manager of a temple and got a decree and on payment being made he handed over the proceeds to the temple committee, and on appeal the decree was reversed and an order for restitution was made it could not be executed by arrest of the manager. 14 M.L.J. 377.

Restitution is not allowed against a person to whom the property to be restored had been transferred for value. 7 A. 681. An attaching creditor of sale proceeds payable to a vendor decree-holder not being a party to the decree in execution of which sale took place, nor to an application for substitution as a vendee of the decree-holder is not a representative of the said vendor decree-holder within the meaning of S. 144, O.P. Code. 29 C.L.J. 360=51 I.O. 375. This section does not refer to third persons who were parties neither to the objection proceedings nor to the proceedings in appeal. 16 O.C. 225=21 I.C. 570. A person who did not enter into possession of the property in virtue of a decree in his favour cannot be made liable to pay mesne profits by way of restitution. 41 I.O. 23. In such a case the court has power under its inherent powers to order restitution. 61 P.R. 1917.

Representatives.—The doctrine of restitution applies to representatives of the parties to the suit. 46 I.C. 168=27 C.L.J. 489. The question of restitution of property sold under a decree is restricted not merely to the parties themselves but also extends to their representatives within the meaning of S. 47 and the term representative includes not merely legal representative but also assignees. 17 S.L.R. 73=80 I.C. 1002.

Receiver.—When a suit for a declaration to establish a right to the attached property was filed and a receiver was appointed in the suit which is subsequently dismissed, the decree-holder who had attached the property cannot get back the property on an application under S. 144 but only by means of a suit. 73 I.C. 602=1923 A. 64.

Surety.—S. 144 does not apply to sureties and restitution cannot be applied for against the surety of a party. 18 A.L.J. 263=46 I.A. 228 P.C.

WHEN A DECREE IS VARIED OR REVERSED.—The decree may be varied or reversed in the following ways. 1.—In appeal (first or second) or in appeal to the Privy Council. 3 C. 30; 43 B. 492; 5 I.C. 776=7 M.L.T. 107; 21 B. 55. 2.—In revision. 3.—When a suit decreed *ex parte* is set aside. 44 B. 702; and the decree in the suit is different from the *ex-parte* decree. 30 A. 476; also when the decree is not different from the *ex-parte* decree and is again in favour of the plaintiff on the ground that the sale in execution under the previous decree which has been set aside should itself be set

aside as having been no longer based on any solid foundation. 43 B. 235. 4.—By amendment of the decree. 27 A. 485. 5.—By review. 28 A. 665. 6.—By a subsequent litigation. 17 S.L.R. 73=80 I.C. 1002. As the result of a separate suit setting aside or altering the terms of the decree. 76 P.R. 1902; 53 I.C. 552=19 S.L.R. 153. When a decree is set aside as null and void the Court has inherent power under S. 151 to order restitution. 84 I.C. 75=46 A. 767. 7.—When the decree-holder does not comply with the terms of the appellate decree and the decree of the first Court is thereby set aside. 32 A. 79. 8.—When a preliminary decree for partition is set aside on appeal the final decree which may have been passed pending the appeal from the preliminary decree becomes ineffective. Consequently a party from whom any money has been levied under the final decree so rendered inoperative is entitled to restitution of the amount from the party who levied it on the basis of the final decree. 27 C.L.J. 451=43 I.C. 776. 9.—Restitution may be claimed by the opposite parties in successive reversals of the decree by the appellate Courts in order. 43 B. 433. 43 B. 492. 10.—When an erroneous order granting the decree-holder execution under the erroneous impression that he had fulfilled the terms of the decree is reversed, restitution can be claimed. 72 I.C. 879=1922 O. 16. 11.—The decree must be reversed or set aside by a Court of competent jurisdiction. When the decree of an Assistant Collector was reversed by the Board of Revenue, which had no jurisdiction at all, the principle of *res judicata* would not apply. 20 A. 237. 12.—When a preliminary decree is set aside on appeal, any money paid under the final decree may be recovered from the party who levied it. 43 I.C. 775=27 C.L.J. 451.

HOW RESTITUTION MAY BE MADE.—By Refund of money paid.—Restoration of money paid in surplus may be ordered. 22 A. 79; 5 C.W.N. 287. Money paid may be refunded to a pre-emptor. 18 A. 262; A.W.N. (1888) 287; 10 A. 354; 76 P.R. 1902; 10 A. 400. In case of redemption when the appellate decree reduced the amount payable the plaintiff was held entitled to recover the difference between the sum originally decreed and paid and the sum due on appeal. 7 A. 432; 21 B. 55. Refund of an amount on the reversal of a decree of a Revenue Court was ordered in 26 A. 149. A restoration of money paid in satisfaction of the decree though not certified to the Court, may be ordered. 11 B. 724. Refund of excess payment may be ordered. 15 W.R. 74. The Court has jurisdiction to enforce its order for refund by imprisonment of the party against whom the order is made or by attachment and sale of his property or by both. 32 C. 921; 36 I.C. 457=22 C.W.N. 160. Refund of costs may be ordered. 20 W.R. 49.

When possession is wrongly delivered against the judgment-debtor, he may apply for restitution and it is the duty of the Court to order restitution. 18 N.L.R. 24=64 I.C. 732. In a suit for redemption of a Karnavan the defendants are not entitled to recover possession from the plaintiff (which he had taken in pursuance of the order of the trial Court) simply because the amount of compensation for improvements was increased on appeal. 73 I.C. 1041=45 M.L.J. 323; 13 L.W. 449; 44 M. 961. Possession must be restored although the appellate decree is silent. 7 A. 197.

A sale of the property in favour of the decree-holder auction-purchaser may be set aside. 27 M. 604; 34 I.C. 747=1 Pat. L.J. 43.

Damages for removal of the subject-matter of the suit may be allowed. 13 B. 485; even though the decree of the appellate Court merely reversed the decree of the lower Court awarding possession. (*ibid*).

Costs may be ordered to be refunded although the decree of the lower Court is silent. 49 P.R. 1896; 4 O. 229; 54 I.C. 816; 63 I.C. 513=19 A.L.J. 771; 20 W.R. 49; 1 C.W.N. 197; 30 I.C. 680=8 Bur. L.T. 155; 46 A. 767. Costs with interest may be recovered. 8 A. 262; 20 O.C. 327=43 I.C. 337.

Interest.—Interest may be allowed on the amount recoverable. 7 A. 432 ; 9 M. 506 ; 11 M. 261 ; L.R. 3 P.C. 465 ; 20 A. 430 ; 22 P.R. 1896 ; 3 O. 161 ; 173 P.C. ; 18 A. 262 ; 35 B. 255 ; 32 O.W.N. 160 = 36 I.O. 457 ; 39 I.C. 22 = 2 Pat. L.J. 149 ; 28 M. 355 ; 15 W.R. 74 ; 21 A. 1 ; 38 I.O. 17 = 21 O.W.N. 564 ; 8 A. 262 ; A.W.N. (1897) 76. Interest at a sufficient rate may be substituted for the profits which the person in possession under the mortgage decree which was subsequently reversed enjoyed during the period between his execution of the first Court's decree and his giving notice that he had deposited the additional amount. 73 I.O. 1041 = 45 M.L.J. 323 ; 8 L.W. 179. When in pursuance of an order for costs the defendant pays the amount to the plaintiff and the order is reversed on appeal, the defendant is entitled not only to the refund of money paid but also to interest thereon. 19 A.L.J. 771 = 63 I.C. 513. A successful appellant claiming refund of costs, with interest, recovered from him in execution of the decree of the lower Court subsequently reversed in appeal can claim interest on the amount recovered from him. 8 A. 262 ; 9 M. 506 ; 15 M. 203 ; 20 A. 430. It is a rule of law that when a party has wrongfully taken from the Court money deposited in Court by his opponent that Court has inherent power to enforce a refund of the amount with interest. 35 B. 255 ; 14 O. 484 ; 3 B. 42. 6 per cent, interest was allowed in 21 O.W.N. 564 = 38 I.O. 17 ; 15 M.L.J. 247. A pre-emptor whose decree has been reversed is entitled to a refund of the price paid by him with interest. 18 A. 262 ; A.W.N. (1886) 178. Interest on costs may be allowed. 20 W.R. 49 ; 8 A. 262 ; 4 O. 229 ; 43 I.C. 337 = 20 O.C. 327 ; 63 I.C. 513 = 19 A.L.J. 771 ; 1898 P.J. 235. Interest on mesne profits also may be allowed. 5 W.R. 125 ; 15 M. 203 ; 73 I.O. 1041 = 45 M. L.J. 323. A party is not entitled to interest on the money deposited in Court but not taken out by his opponent. 19 I.O. 1 ; 8 M. 494. A Court can award interest upon interest to a successful appellant. 9 M. 506 ; 40 M. 299. The Court may award such interest as it chooses. 2 Pat. L.J. 149 ; 44 M. 570.

Mesne profits may be recovered. 61 P.R. 1919 ; 15 O.L.J. 187 ; 30 I.C. 680 = 8 Bur. L.T. 650 ; 26 I.C. 890 = 19 O.W.N. 1167 ; 14 O. 484 ; 21 O. 989 ; 11 M. 261 ; 24 M. 341 ; 11 O.C. 235 ; 28 I.O. 85 ; 7 A.L.J. 1 ; 21 A. 1 ; 31 A. 551 P.C. ; 32 A. 79 ; 38 A. 163 P.C. ; 53 I.C. 119 ; 14 I.C. 456 ; 20 O.W.N. 425 ; 5 I.C. 776 ; 3 O. 720 ; 17 I.O. 121 = 16 O.L.J. 135 ; 16 I.C. 966 ; 19 I.O. 1 ; when a decree is reversed in appeal a party is entitled to restitution not only of the property but also to the mesne profits ; though the appellate decree had made no order respecting them during the time he was out of possession. 3 O. 720 ; 21 O. 989 ; 9 W.R. 403 ; 10 W.R. 131 ; B.L.R. Sup. Vol. 985. When in execution of a rent decree the landlord decree-holder purchased the property, and settled it with another tenant, and the decree was subsequently set aside at the instance of the tenant judgment-debtor, *held* that the latter was entitled to possession as against the tenant settled by the decree-holder purchaser under S. 144, C.P. Code, as well as to mesne profits for the period he was out of possession against the landlord decree-holder. 51 I.C. 959 = 20 O.W.N. 50. When a decree in favour of the landlord against the tenant was reversed and the tenant applied for restitution of the tenancy with mesne profits and the landlord claimed rent for the same period, *held* that there was no obligation on the part of the tenants to pay rent to the landlord during the time the latter was in unlawful possession of the holding and that in any event he was not entitled to set off, as the tenants were entitled to be placed in the position that they were in previously, irrespective of any other rights accruing to any of the parties during the period of litigation. 19 M.L.T. 336 = 34 I.O. 2. When on a sale being set aside the judgment-debtor is restored to possession he should pay to the purchaser the amount of the purchase money less the amount of the mesne profits derived by the purchaser in the interval. The interest on mesne profits may be set off against the interest on the purchase-money. But the purchasers who have in the meantime discharged the encumbrances of their own accord and without any order of court were entitled to the benefit of the security and not a refund of the amount as a

condition precedent to their surrendering possession. 1922 P.C. 269—49 I.A. 351 P.C. The Court executing the decree is not deprived of its jurisdiction to award mesne profits by way of restitution in the absence of a specific direction in the decree of the appellate Court. 4 I.C. 376—7 A.L.J. 1; 29 I.C. 880; 3 O. 720; 21 O. 989; 9 M. 506; 21 O. 496; 6 O.W.N. 710; 21 A. 1; 14 O. 605; 14 O. 484; 28 P.R. 1894. By mesne profits is meant the profits which have accrued during the possession of the party for the time to which the claimant was entitled. 21 A. 989; 21 A. 1; 20 A. 480; 18 A. 262. In the case of a pre-emption decree, the plaintiff is not allowed mesne profits for the period between the institution of the suit and date of the decree, as there is no question of restitution. 44 P.L.R. 1910. S. 144 does not define the full measures of the power of restitution. The section may be taken as a guide to determine in what class of cases an order for restitution may be made so that complete justice may be dealt between the parties concerned as they may be restored to the *status qua*. The Court has power to recall money improperly paid out. 35 C.L.J. 53—64 I.C. 864—11 C.L.J. 533. The court need not consider all the various positions taken up voluntarily by the parties as the remote consequences of the order. 37 I.C. 863—5 Pat. L.W. 238. When a decree for enhanced rent, which made the payment at an enhanced rate conditional upon the confirmation of an earlier decree for enhanced rent for a previous year by the appellate Court, had been executed, the debtor would be entitled, on the reversal of the earlier decree, to recover the amount realised at enhanced rates under the second decree, that part of the decree according to enhanced rate having been superseded by the order of the appellate Court in the first suit. 5 O. 589.

Adjustment of Accounts.—An adjustment of accounts may be allowed under this section by way of restitution. 6 O.W.N. 710.

Restitution in case of reversal of an *ex parte* decree.—Where an *ex parte* decree is set aside on appeal and the case remanded under O. 41, r. 28, the appellant is entitled to restoration even though there be an appeal preferred against the remand order. 3 O.L.J. 181; 14 O. 484; 21 O. 989. When the decree holder was the purchaser in execution of the *ex parte* decree which is subsequently set aside the sale should be set aside even if it is confirmed. 27 O. 810; 31 O. 499; 27 M. 98; 6 O.L.J. 92; 3 I.C. 30; 72 I.C. 512—2 Pat. 277. When an *ex parte* decree is set aside by the court passing it a claim for restitution may be enforced by means of a suit. 34 I.C. 747—3 Pat. L.W. 95; 31 A. 864.

Setting aside a sale in favour of a stranger.—Restitution cannot be made against a *bona fide* purchaser except the decree-holder, for value at an auction sale held by a competent Court. 38 A. 240; 41 M. 467; *Contra* held in 45 I.C. 168; 28 A. 337; and the sale was set aside.) The party is entitled only to the sale proceeds in such a case. 14 O. 18; 10 A. 166; 23 M. 306; 16 O.C. 225; 21 B. 463. When a sale against a stranger auction-purchaser is set aside the only restitution to which the auction-purchaser is entitled is that of the amount paid by him for the property sold, 49 I.C. 351 P.C. and the decree-holder may be ordered to pay the money with interest for the term he enjoyed the use of the money. 13 L.W. 217. When the sale is set aside but on appeal it is confirmed, the money withdrawn by the auction-purchaser may be ordered to be refunded under the inherent powers of the Court. 39 I.C. 763—1 Pat. L.W. 551. A purchaser paying revenue for the land purchased is entitled to be reimbursed. 51 I.C. 706. When a decree is modified in appeal, then though the decree-holder is not entitled to set aside the sale in execution, yet he is entitled to restitution of the property under S. 144, O.P. Code. 1926 R. 126—5 Bur. L. J. 66. A *bona fide* purchaser who is not a party to the suit or proceeding in which the auction sale is held is entitled to hold the property even though the decree is set aside. But the case is different in the case of a party to the s , even though he gets no benefit directly

under the decree. It is only the *bona fide* purchaser who is entitled to hold the property in such a case. 1926 M. 78=48 M. 767; 10 A. 166 P.C.

Setting aside sale in favour of the decree-holder purchaser.—When a decree is modified in appeal and the amount of the original decree, Rs. 7,695, is reduced to 7,495, a sale of the properties of the judgment-debtor numbering 19 could not be set aside when four properties were purchased by the decree-holder and the judgment-debtor was not prejudiced by the sale because even the last item was required to be sold to make up the amount of the appellate decree. 42 M.L.J. 315=16 L.W. 355. When a decree is reversed the sale may be set aside. Although the sale is not formally set aside it may be treated as a nullity. If the property purchased at the sale can be restored, it must be restored together with any loss suffered by the applicant arising out of his having been deprived of the profit earning capacity of the property or anything like interest upon money or mesne profits upon land which he might have enjoyed if he had been left in undisturbed possession. When the property cannot be restored, the original decree-holder must make good the loss. It is very difficult in many cases to assess the loss. L.R. 3 A. 443; 14 I.C. 456=8 O.C. 254. The Court has power to set aside a sale by way of restitution. 27 M. 504. When a decree is reversed the decree-holder auction-purchaser is bound to return the property sold and not merely the proceeds of the sale thereof. 5 M. 106; 3 C. 720; 31 C. 499; 10 A. 166; 14 C. 18; 22 A. 168; 27 C. 810; 68 I.C. 516=(1922) M.W.N. 141; A.W.N. (1897) 28; 51 I.C. 959=29 C.L.J. 486; 27 M. 98. Where a decree-holder has obtained possession of the mortgaged property on the basis of the decree-absolute which is subsequently set aside he is bound to make restitution to the mortgagor. 27 I.C. 813=21 C.L.J. 75; but see 361 C. 336 P.C. to the contrary.

RESTITUTION BY SUCCESSIVE APPLICATIONS—An application for restitution is not subject to the provisions of O. 2, r. 2. 40 M. 780; 47 I.C. 47=3 Pat. L.J. 367. When a party has obtained restitution, by an application under this section, of an amount paid to the other party he is not precluded from bringing a fresh application for interest or damages on the amount recovered. 40 M. 780. A fresh application for mesne profits lies even after the party has recovered the immoveable property by a previous application under the section. 47 I.C. 47.

COURT OF FIRST INSTANCE.—Under the old Code the application for restoration was to be preferred "to the Court which passed the decree against which the appeal was preferred." 5 C.W.N. 289. But under the present Code, the application must be made in all cases, whether the decree is reversed in first or second appeal or revision, etc., to the Court of first instance. 61 I.C. 962=13 L.W. 67; 65 I.C. 798. The "Court of first instance" means the Court which passed the decree. 67 I.C. 962=13 L.W. 67. The Court to which a decree has been transferred has also the same powers of restitution as the Court of first instance. 20 I.C. 540=7 S.L.R. 19. Where an *ex parte* decree of one Court is set aside and case transferred to another Court for trial the former Court has jurisdiction to entertain the application for restitution. 44 B. 702. The jurisdiction of the Court of first instance continues in all matters in execution even if the value of the matter in execution exceeds the ordinary pecuniary limits of its jurisdiction. 13 B. 485. The appellate Court has all the powers of the first Court. But S. 144 makes it imperative on the Court of first instance to cause restitution as far as may be, and for the purpose of restitution it is empowered to make any necessary order. 30 M.L.J. 497=34 I.C. 760.

ENQUIRY.—The object of S. 144 is to restore the *status quo ante* which might be done after taking evidence, if necessary. 55 I.C. 356.

SUIT FOR RESTITUTION.—A suit is not maintainable for restitution of the property. It is expressly barred by cl. (2) of the section. 49 I.C. 721=17 A.L.J. 174; 13 I.C. 179=22 M.L.J. 146. There was a conflict of decisions under the old Code as to

whether a suit lay or not. See 29 A. 348 ; 25 A. 441 ; 35 O. 265 ; 22 A. 79 ; 33 O. 857 ; 6 W.N. 710 ; 10 C. 220 ; 11 M. 261 ; 15 M. 203 ; 24 M. 341 ; 26 A. 149 ; 22 O. 501 ; 10 M. I.A. 203. The effect of an appellate court decree reversing or modifying an original decree is to direct restitution of any sum paid under the latter decree which is disallowed by the appellate decree and the recovery of such sum is a question in execution and cannot form the subject of a separate suit 7 A. 432. It was held that both the remedy by an application and a separate suit were provided for restitution under the old Code in 10 M.I.A. 203 ; 24 M. 341 ; 26 A. 149 ; 22 O. 501 ; 3 C. 720 ; 21 C. 340 ; 14 C. 484 ; 14 C. 605 ; 30 O. 20 ; 4 O. 625 ; 5 O. 589 ; 31 A. 551. Where restitution cannot be obtained by application under S. 144 (1), C.P. Code, there is no bar to the institution of the suit for the recovery of damages by a successful defendant against an unsuccessful plaintiff for bringing a false suit which involved great injury to the defendant. 44 A. 687.

INHERENT POWER OF RESTITUTION.—The Court has an inherent power to grant restitution in cases not covered strictly by this section. 14 C. 484 ; 64 I.O. 864 = 35 O.L.J. 53 ; 67 I.O. 369 = 42 M.L.J. 368 ; 69 I.O. 724 = 1 R. 770 ; 27 O.W.N. 582 = 65 I.C. 278 ; 21 O. 989 ; 28 A. 665 ; 29 A. 143 ; 14 I.C. 456 ; 75 I.O. 858 ; 78 I.O. 310 = 9 Pat. L.T. 553 ; 69 I.O. 369 ; 63 I.O. 43 ; 61 P.R. 1917 ; 54 I.O. 664 ; 2 L.L.J. 207 (a case where the decree-holder was allowed *mesne profits* for obtaining to get possession till the decision of appeal) ; 47 B. 674 ; 72 I.O. 879 = 1923 O. 16 ; 83 I.C. 138 ; 15 C.L.J. 187. In cases not comprehended strictly within the letter of S. 144, restitution is not a matter of right, but depends on the sound discretion of the Court and will be ordered only when the justice of the case calls for it. The Court should not withhold relief by way of restitution when a sum has been paid out on the strength of an erroneous decision upon a point of limitation. 21 O.W.N. 564 = 38 I.C. 17. The discretionary power given to a court by S. 151, C.P. Code, cannot enlarge the scope of S. 144 of the Code and cannot convert an application for a relief which has nothing to do with restitution into an application for restitution. 4 L.W. 400 = 34 I.O. 774. An application by the attaching creditor asking the court to compel a person who has improperly collected the debts attached under an order of the court to discharge the amount and pay it back into court under the penalty, in case of refusal, of being arrested is an application to the court to exercise its inherent powers of compelling restitution of money improperly collected in defiance of its orders. 27 A. 978. The court has inherent power to undo a wrong done in execution of a decree and to order the restitution of everything that has improperly been taken in such execution. 9 C. W.N. 381 ; 21 O. 989 ; 33 O. 927. The principle is that where a court by a temporary injunction deprived a person of what he was legally entitled to, it should restore that which he has lost with compensation. 54 I.O. 664. Where A sued to establish his right to certain money which had been paid into Court by a third person which the defendant was allowed to draw on an undertaking to repay it if the plaintiff, A, succeeded ; and A obtained the decree and established his right, it was held that the court had inherent power to order the defendant to repay the money with interest. 41 M. 316 ; 2 Pat. L.J. 149. Where execution of a decree for possession is stayed pending the decision of the appeal against the decree and the appeal is dismissed the court has inherent power to allow *mesne profits* for the time during which the applicant had been kept out of possession by the court's order. 63 I.O. 43 ; 2 L.L.J. 207. A party who withdrew the money in deposit in court to which another person was found entitled, is liable to pay interest on the amount drawn out by him till the date he paid back the money. 22 M.L.T. 162. When a certain property is sold in execution of a prior mortgage-decree and again in execution of a subsequent mortgage-decree, where the judgment-debtor the decree-holder the previous purchaser and the subsequent purchaser were all parties to the proceedings, the court has power under S. 151 to direct the decree-holder to refund the

amount paid by the auction-purchaser as the price of the property. 1926 A. 274=92 I.O. 571.

APPEAL.—An order under this section is a decree under S. 2 (2), C.P. Code and hence is appealable. 35 C. 265 ; 26 I.O. 890=19 C.W.N. 1167 ; 28 C.W.N. 988. Under the old Code, an order for restitution was not appealable. 32 C. 921. A decision on an application for restitution under S. 144 to be appealable as a decree under S. 2 must be a decision on the merits of the application and not on a matter incidental or collateral to the application. 110 P.R. 1913 ; 79 I.O. 636=20 N.L.R. 170. When the application for execution does not fall within the scope of S. 144, the order passed on it is not a decree. 10 P.R. 1914 ; 222 P.L.R. 1919=24 I.O. 941. But when the order is made under S. 144, in favour of the applicant, he cannot object to the appeal being entertainable. 26 I.O. 890=19 C.W.N. 1167 ; 39 I.O. 653=2 Pat. L.J. 206. An order of a Revenue Court refusing to direct restitution is not a decree under S. 2 (2) and hence is not appealable as such to the Civil Court. 65 I.O. 798.

COURT-FEE ON APPEAL.—An order under S. 144, C. P. Code, comes under S. 47 (1) of the Code. Cl. (b) of the notification of the Government of India No. 4650, dated the 10th September, 1889, applies to appeals from such orders and a Court-fee of two rupees is chargeable on such appeals. 21 C.W.N. 544=39 I.O. 640 ; 1 Pat. L.W. 150. An appeal from an order passed on an application for restitution under this section must be stamped *ad valorem* under Art. 1, Sch. 1 of the Court Fees Act as an appeal from a decree and cannot be filed as an appeal from an order in execution of a decree with a fixed Court-fee stamp. 82 I.C. 321 ; A.W.N. (1901) 180 ; 67 I.O. 225=14 N.L.R. 15.

LIMITATION FOR AN APPLICATION.—An application for restitution under S. 144 of the C. P. Code is an application for execution of a decree within the meaning of Art. 182 of the Limitation Act. 41 B. 625 ; 43 B. 235 ; 67 P.R. 1918 ; 45 B. 1137. 42 I.O. 530=(1917) M.W.N. 643 ; 40 M. 780 ; see 76 I.O. 255. *Contra* held by the High Court of Allahabad, Patna and Calcutta and other provinces and held that an application for restitution under S. 144 is not an application for execution and is therefore governed by Art. 181 of the Limitation Act. 63 I.O. 184=19 A.L.J. 549 ; 27 A. 485 ; 3 Pat. L.J. 367 ; 2 Pat. L.J. 206=39 I.O. 653 ; 3 P. 371 ; 38 I.O. 17=21 C. W.N. 564 ; 30 I.O. 680=8 Bur. L.T. 165 ; 67 P.R. 1918 ; 76 I.O. 501 ; 54 I.O. 664 ; (Central Provinces) ; 28 C. 113 ; 20 I.O. 588 ; 14 A.L.J. 401 ; 46 I.O. 323 ; 49 I.O. 948 ; 15 A.L.J. 57 ; 7 A. 371. An application for restitution consequent upon a decree of His Majesty in Council is governed by Art. 183 of the Limitation Act. 66 I.O. 545. S. 6 of the Limitation Act applies to an application made under S. 144 C. P. Code. 41 B. 625 ; 43 B. 235 ; (1923) Pat. 371 ; 40 M. 780 ; 21 C.W.N. 544 ; 11 C.L.J. 541 ; 1926 O. 199=92 O.C. 23.

CHAPTER XVI.

ARREST AND ATTACHMENT BEFORE JUDGMENT.

PART I.—ARREST BEFORE JUDGMENT.

ORDER 38, r. 1.—WHERE DEFENDANT MAY BE CALLED UPON TO FURNISH SECURITY FOR APPEARANCE.—(1) Where at any stage of a suit other than a suit of the nature referred to in section 16, clauses (a) to (d), the Court is satisfied, by affidavit or otherwise,—

- (a) that the defendant with intent to delay the plaintiff or to avoid any process of the Court, or to obstruct or delay the execution of any decree that may be passed against him,—
 - (i) has absconded or left the local limits of the jurisdiction of the Court ; or—
 - (ii) is about to abscond, or leave the local limits of the jurisdiction of the Court ; or
 - (iii) has disposed of or removed from the local limits of the jurisdiction of the Court, his property or any part thereof,
- (b) that the defendant is about to leave British India under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

the Court may issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not furnish security for his appearance :

Provided that the defendant shall not be arrested if he pays to the officer entrusted with the execution of the warrant any sum specified in the warrant as sufficient to satisfy the plaintiff's claim, and such sum shall be held in deposit by the Court until the suit is disposed of or until the further order of the Court.

GROUND FOR AN ORDER UNDER THIS RULE.—A creditor is not entitled to an order under this rule merely because he has a just claim against his debtor. He must prove one of the conditions required by the rule. 1 N.W.P. 91. Where a person is brought for attendance in a Criminal Court and the Civil Court is also held there, his departure from the place is not a sufficient ground for making an order for arrest before judgment. 4 L.L.J. 423. The Court is also to look to the *bona fides* of the suit. 14 C. 695.

SECURITY.—(1) Where the defendant fails to show such cause the Court shall order him either to deposit in Court money or other property sufficient to answer the claim against him, or to furnish security for his appearance at any time when called upon while the suit is pending and until satisfaction of any decree that may be passed against him in the suit, or make such order as it thinks fit in regard to the sum which may have been paid by the defendant under the proviso to the last preceding rule.

(2) Every security for the appearance of a defendant shall bind himself, in default of such appearance to pay any sum of money which the defendant may be ordered to pay in the suit. (O. 38, r. 2.)

SCOPE.—There are two kinds of securities mentioned in this rule. The defendant may give security for his appearance in Court; or he may deposit money or other property sufficient to answer the claim against him. 41 M. 1053. The object of the security is to secure the rights of the creditor. The Government is not interested in it in any way. 28 I.C. 92=8 S.L.R. 270.

SECURITY AND RIGHTS OF THE CREDITOR.—Money paid in Court by the defendant under this rule is paid to the general credit of the suit, and is charged with a lien in favour of the plaintiff for the amount that might be decreed in his favour and neither the receiver of the judgment-debtor's estate, nor the general body of creditors has a right to the fund in question. 41 M. 1053; 56 I.C. 267=11 L.W. 6; but see 39 M. 309.

APPEAL.—An appeal is allowed from an order under this rule by O. 43, r. 1 (2) of the O.P. Code.

PROCEDURE ON APPLICATION BY SURETY TO BE DISCHARGED.—(1) A surety for the appearance of a defendant may at any time apply to the Court in which he became surety to be discharged from his obligation.

(2) On such application being made, the Court shall summon the defendant to appear, or if it thinks fit, may issue a warrant for his arrest in the first instance.

(3) On the appearance of the defendant in pursuance of the summons or warrant or on his voluntary surrender, the Court shall direct the surety to be discharged from his obligation and shall call upon the defendant to find the fresh security. (O. 38, r. 3.)

SCOPE.—A surety is not entitled to be discharged under this rule when the defendant appears in Court to defend his case as such an appearance does not amount to surrender. 43 M. 272. The consent of the defendant to a consent decree without the surety's assent does not discharge the latter under this rule. (*ibid*).

APPEAL.—An appeal is allowed from an order under this rule by O. 43, r. 1 (g).

PROCEDURE WHERE DEFENDANT FAILS TO FURNISH SECURITY OR FIND FRESH SECURITY.—Where the defendant fails to comply with any order under rule 2 or rule 3, the Court may commit him to the civil prison until the decision of the suit, or where a decree is passed against the defendant until the decree has been satisfied: Provided that no person shall be detained in prison under this rule in any case for a longer period than six months, nor for a longer period than six weeks, when the amount or value of the subject-matter of the suit does not exceed fifty rupees:

Provided also that no person shall be detained in prison under this rule after he had complied with such order. (O. 38, r. 4.)

SCOPE.—This rule is confined to cases where the defendant neither furnishes security, nor makes a sufficient deposit. 13 W.R. 278.

PART II.—ATTACHMENT BEFORE JUDGMENT.

WHERE DEFENDANT MAY BE CALLED UPON TO FURNISH SECURITY FOR PRODUCTION OF PROPERTY.—Where at any stage of a suit, the Court is satisfied, by affidavit or otherwise that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him—

- (a) is about to dispose of the whole or any part of his property, or
- (b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court,

the Court may direct the defendant within a time to be fixed by it, either to furnish security in such sum as may be specified in the order to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree or to appear and show cause why he should not furnish security.

(2) The plaintiff shall, unless the Court otherwise directs, specify the property required to be attached and the estimated value thereof.

(3) The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified. (O. 38, r. 5.)

LEGAL CHANGES.—(1) Under the old Code there was a restriction of the locality in which property capable of being attached was situate, but under the present Code there is no such restriction. 10 I.C. 794. (2) The words "or has quitted the jurisdiction of the Court leaving therein property belonging to him" have been omitted in this Code from cl. (b) of the old Code.

SCOPE.—Where the defendant fails to show cause under this rule he may be ordered finally to furnish security or his property may be attached under r. (6). 50 O. 215. The object of the rule is to enable the plaintiff to realise his decree (if any) from the defendant's property. 26 C. 531. A plaintiff may obtain an order under this rule in a suit on a mortgage with respect to properties, not included in the mortgaged deed. 16 A. 186; 46 C. 245; 15 I.C. 604; 1922 N. 238. The order under cl. (1) is an order of attachment. The attachment which the Court has power to withdraw under cl. (2) is a conditional attachment made under cl. (3) of r. 5. 38 I.C. 689=23 C.L.J. 692. An attachment before judgment cannot be ordered in a divorce case. 37 C. 613. An attachment before judgment cannot be ordered pending an application for leave to sue as a pauper. 38 I.C. 600=25 C.L.J. 159. A conditional order of attachment before judgment under sub-rule (3) cannot be made without an order under cl. (1) directing the defendant to furnish security or to show cause. 57 I.C. 907.

GROUND FOR AN ORDER UNDER THE RULE.—The Court should not lightly exercise the power under this rule, or without clear proof of the existence of the mischief aimed at in this rule. 73 I.C. 721=5 Pat. L.T. 124. Where the defendant is going to make away with his property so as to make it impossible for the plaintiff to execute any possible decree the Court may proceed under the rule. 6 W.R. Mis. 1. The plaintiff must satisfy the Court by clear and definite evidence that there is reasonable cause for believing that the defendant is about to dispose of the whole or a part of his property with a view to defeating his creditors. 44 I.C. 240. The mere fact that the defendant has attempted to sell some of his property while proceedings against him are pending does not justify an inference that he is disposing of the property with intent to obstruct or delay the execution of any possible decree. 45 B. 1256. It need not be proved that the attempt at alienation was made after the commencement of the action. The Court may look to the conduct of the parties immediately before the suit. 5 I.C. 181=11 C.L.J. 19. The fact that the defendant

is in straitened circumstances is not sufficient, 25 M.L.T. 46. It must be proved that the defendant had an intention of alienating his property, 73 I.O. 721.

POWER OF SMALL CAUSE COURT.—The Provincial Small Cause Court has power to attach before judgment any property moveable or immoveable, 49 O. 994; 82 I.O. 109 F.B. = 28 C.W.N. 1056 F.B.; 43 I.O. 123.

APPEAL.—An appeal does not lie from an order under this rule, dismissing the application, 33 I.O. 689 = 23 C.L.J. 392. An appeal does not lie from an order directing the defendant to furnish security, 50 O. 215.

ATTACHMENT BEFORE JUDGMENT BEYOND JURISDICTION.—A Court can attach before judgment property outside the jurisdiction, 7 C.W.N. 216; 10 I.O. 794 = 4 Bur. L.T. 89; see 47 M.L.J. 94. Under the old Code there was a conflict of decisions and *contra* was held in 5 Bom. L.R. 570; 8 M. 20; 31 M. 502; 3 L.B.R. 255; 1 L.B.R. 310. The procedure is prescribed by S. 136 of the O.P. Code.

ATTACHMENT WHEN CAUSE NOT SHOWN OR SECURITY NOT FURNISHED.—(1) When the defendant fails to show cause why he should not furnish security, or fails to furnish the security required within the time fixed by the Court, the Court may order that the property specified, or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, be attached.

(2) Where the defendant shows such cause, or furnishes the required security and the property specified or any portion of it has been attached, the Court shall order the attachment to be withdrawn, or make such other order as it thinks fit. (O. 38, r. 6.)

APPEAL.—An appeal is allowed from an order under this rule by O. 43, r. 1 (g).

MODE OF MAKING ATTACHMENT.—Save as otherwise expressly provided, the attachment shall be made in the manner provided for the attachment of property in execution of a decree. (O. 38, r. 7.)

INVESTIGATION OF CLAIMS TO PROPERTY ATTACHED BEFORE JUDGMENT.—Where any claim is preferred to property attached before judgment such claim shall be investigated in the manner hereinbefore provided for the investigation of claims to property attached in execution of a decree for the payment of money. (O. 38, r. 8.)

SCOPE.—The effect of the rule is to incorporate all the provisions of O. 21, rr. 58 to 63. 41 M. 849; 41 M. 23; 37 A. 575; 17 C. 436 P.O.

REMOVAL OF ATTACHMENT WHEN SECURITY FURNISHED OR SUIT DISMISSED.—When an order is made for attachment before judgment, the Court shall order the attachment to be withdrawn when the defendant furnishes the security required together with security for the costs of the attachment, or when the suit is dismissed. (O. 38, r. 9.)

SCOPE.—The attachment before judgment falls to the ground on the dismissal of the suit even though no order to the effect is made and whether an appeal is filed from the suit or not. 45 O. 790; 10 A. 506; 9 I.C. 918=13 C.L.J. 243. The reversal of the decree does not revive the attachment. (*ibid*).

ATTACHMENT BEFORE JUDGMENT NOT TO AFFECT RIGHTS OF STRANGERS, NOR BAR DECREE-HOLDER FROM APPLYING FOR SALE.—Attachment before judgment shall not affect the rights existing prior to the attachment of persons not parties to the suit, nor bar any person, holding a decree against the defendant from applying for sale of the property under attachment in execution of such decree. (O. 38, r. 10.)

37 A. 575; 21 C.L.J. 614; 1 Bom. H.C.R. 226.

SCOPE.—An attachment before judgment does not bar a process of execution against the property attached in satisfaction of a decree in another suit. 6 M.H.C. R. 136; 61 I. O. 922=(1921) Pat. 205. An attachment before judgment does not defeat the right of a co-parcener by survivorship. 83 I. O. 413=(1924) Pat. 465; 40 B. 329; 17 M. 144. The re-attachment is superfluous. 16 I.C. 387.

INSOLVENCY OF JUDGMENT-DEBTOR AND ATTACHMENT BEFORE JUDGMENT.—When there is a vesting order in insolvency before the decree, the property attached before judgment vests in the Official Assignee. 10 O. 150; 8 M. 554; 20 B. 403; 26 M. 673; 39 M. 903.

PROPERTY ATTACHED BEFORE JUDGMENT NOT TO BE RE-ATTACHED IN EXECUTION OF DECREE.—When property is under attachment by virtue of the provisions of this order and a decree is subsequently passed in favour of the plaintiff, it shall not be necessary upon an application for execution of such decree to apply for a re-attachment of the property. (O. 38, r. 11.)

SCOPE.—An attachment before judgment has the same operation in execution as an attachment after decree. 62 I. O. 33=2 Pat. L. T. 719; 47 M. 483; 44 M. 902; 47 M. 176; 33 C. 639. But an application for execution is necessary after the decree. 12 B. 400; 34 M. 25; 33 O. 639. An omission of the defendant to raise an objection to the validity of the attachment on the ground that it is not saleable before the decree, does not take away his right of objection in execution. 38 C. 448.

AGRICULTURAL PRODUCE NOT ATTACHABLE BEFORE JUDGMENT.—

Nothing in this order shall be deemed to authorise the plaintiff to apply for the attachment of any agricultural produce in the possession of an agriculturist or to empower the court to order the attachment or production of such produce. (O. 38, r. 12.)

REMEDIES IN CASE OF WRONGFUL ARREST OR ATTACHEMENT BEFORE JUDGMENT.

COMPENSATION FOR OBTAINING WRONGFUL ARREST, ATTACHMENT, OR INJUNCTION ON INSUFFICIENT GROUNDS —(1) Where in any suit in which an arrest or attachment has been effected or a temporary injunction granted under the last preceding section,—

(a) it appears to the court that arrest, attachment or injunction was applied for on insufficient grounds, or

(b) the suit of the plaintiff fails and it appears to the court that there was no reasonable or probable ground for instituting the same,

the defendant may apply to the Court and the Court may, upon such application award against the plaintiff by its order, such amount not exceeding one thousand rupees as it deems a reasonable compensation to the defendant for the expense or injury caused to him :

Provided that a Court shall not award, under this section, an amount exceeding the limits of its pecuniary jurisdiction.

(2) An order determining any such application shall bar any suit for compensation in respect of such arrest, attachment or injunction. (S. 95.)

SCOPE.—The section provides for a Court trying a suit, and awarding compensation against the plaintiff. 35 M. 598. This section gives the Court trying the suit a special jurisdiction to award compensation as an incidental relief. (*ibid*). It bars a suit in respect of "such arrest attachment or injunction". (*ibid*). But this section does not bar a regular suit for damages for the abuse of the process of the Court, *ibid*. 42 O. 550 ; 1 N. W.P. 91 ; 1 Agra 104 ; 11 W.R. 143 ; 16 O.L.J. 34. A petition under this section does not lie before the suit is heard and decided. 1923 M. 352 = 71 I.C. 450. If a defendant is arrested before judgment he may apply for compensation even if he is not summoned. 15 B. 160. No particular procedure is prescribed for claiming compensation. It is

enough if the Court is seized of the matter in some form or the other. 32 I.C. 592—(1916) 1 M.W.N. 76. Compensation can be awarded only by the Court which disposes of the suit and not by any other Court, on an application under this section. 22 B. 42; 3 W.R. Mis. 28. An order under this section need not be embodied in the decree. Compensation may be awarded for excessive attachment. 6 W.R. Mis. 24. The amount of compensation under this section is limited to Rs. 1,000. 35 M. 598; 42 C. 550. A defendant who claims a larger amount must bring a regular suit. 10 Bom. L.R. 1002. The compensation is for expense or injury caused to the defendant. 32 I.C. 592—3 L.W. 30. A claim for compensation under this section may be taken into account as a cross claim in a suit, 18 B. 717. Under the old Code, an order awarding compensation was alone a bar to a subsequent suit for compensation in respect of arrest, etc. But under the present Code, any order determining any application is a bar to a suit even when the application is refused. 13 W.R. 305.

APPLICATION BY THE DEFENDANT.—It is only on an application by the defendant that the Court has jurisdiction to pass an order under this section. (1920) M.W.N. 192=55 I.C. 786; 32 I.C. 592=3 L.W. 30. A mere statement in a counter-affidavit by the defendant is not an application under this section for award of compensation. 55 I.C. 786.

JURISDICTION OF THE SMALL CAUSE COURT.—A Court of Small Causes has jurisdiction under this section to award damages. 26 M. 504 (*contra* held in 77 P.R. 1907, in case of attachment of immoveable property).

INSUFFICIENT GROUNDS.—The expression is equivalent to "without reasonable and probable cause." 18 B. 717; see also 15 B. 160. Compensation may be awarded if there is no probable ground for instituting the suit. 13 M.L.J. 70.

APPEAL.—An appeal from an order refusing relief under this section is allowed under S. 104 (1) of C.P. Code. 49 I.C. 86=25 M.L.J. 46; 24 M. 62; 28 A. 81. An order awarding compensation is appealable. 11 I.C. 349=21 M.L.J. 460. If the order is passed by an appellate Court on an appeal partly from the decree and partly from the order of the first Court refusing compensation, no appeal is allowed. 11 I.C. 917=4 Bur. L.T. 204. An appeal does not lie from an order of a Court of Small Causes under this section. 50 I.C. 886=(1919) M.W.N. 490; 26 I.C. 359. The right of appeal from an order for compensation is independent of the decree passed in the case. 11 I.C. 917=4 Bur. L.T. 204.

SUIT FOR DAMAGES.—A suit for compensation is maintainable without having recourse to the remedy provided in S. 95, C.P. Code. 1 N.W.P. 91; 11 W.R. 143; 16 C.L.J. 34; 32 M. 170. In a suit for damages, the plaintiff is to prove malice in fact besides want of reasonable and probable cause. 35 M. 598; 86 P.R. 1895; 4 N.W.P. 42; 9 I.C. 60; 5 W.R. 91 P.O.; 32 M. 170; 16 C.L.J. 34; mere malice does not entitle the plaintiff to damages. 39 M. 952. If an injunction is removed on appeal no suit for damages lies. 42 C. 550.

CHAPTER XVII. EXECUTION PROCEEDINGS.

PROCEDURE IN SUITS AND EXECUTION.—The procedure provided in this Code in regard to suits shall be followed as far as it can be made applicable, in all proceedings in any Court of Civil Jurisdiction. (S. 141, C. P. Code.)

The explanation to the corresponding S. 647 of the old Code which specially prescribed that the section did not apply to execution proceedings has been omitted in the present Code. But the effect of the omission is not to cause any change in law, as the Privy Council ruling in 17 A. 106 was passed when the old Code of 1882 was in force and when the explanation was not yet added by Act VI of 1892. 27 I.O. 492=19 C. W.N. 25 ; 8 S.L.R. 327. Hence the procedure provided in the Code for the suits is not applicable to execution proceedings.

RES JUDICATA AND EXECUTION PROCEEDINGS.—See Chapter XIII.

STAY OF EXECUTION PROCEEDINGS.—See Chapter XIV.

RELINQUISHMENT OF PART OF CLAIM.—The provisions of O. 2, r. 2, do not apply to execution proceedings. 62 I.O. 507=15 S.L.R. 11 ; 18 C. 515 ; 17 M. 122 ; 19 A. 98. Successive applications are maintainable to execute the decrees which grants several reliefs by applying for any one relief at a time (*ibid*). 2 L.W. 688. The judgment-debtor is not prevented by O. 2, r. 2, from making objections to the attachment of his property in two lots. 2 I.C. 105. When a decree-holder made an application for execution to recover mesne profits for a period of only three years subsequent to the institution of the suit, he was not prevented by O. 2, r. 2, from making another application for recovery of mesne profits for the further period. 39 M. 199. See also 40 M. 780 ; 2 L.W. 288 ; 30 I.O. 246.

DISMISSAL FOR DEFAULT AND RESTORATION.—The provisions of O. 9 do not apply to execution proceedings. 5 Pat. L.J. 330 ; 8 S.L.R. 327 ; 5 L.W. 124=21 M.L.T. 297 ; 79 I.O. 357 ; 15 . 84 ; 18 B. 429 ; and consequently the application for execution when dismissed for default cannot be restored under O. 9, r. 4, C.P. Code, 79 I.O. 351 ; 35 I.C. 937 ; 17 A. 106 ; 2 L. 66 ; 68 I.O. 643 ; 75 I.O. 487=1923 L. 506 ; 1 Lab. Cas. 49 ; 44 O. 1 ; 38 M. 199 ; 64 I.C. 420 ; 18 B. 429 ; 71 I.O. 484=1923 P. 78 ; 79 I.O. 594 ; 63 I.O. 895. An order for restoration under O. 9, r. 4 is a nullity. 35 M. 337. But the decree-holder may bring a fresh application for execution or he may apply for review under O. 47, C.P. Code, 4 Pat. L.J. 330=35 I.C. 337 ; 41 C. 1 ; 17 A. 106 ; 11 I.C. 385=13 O.L.J. 532 ; 2 L. 66 ; 10 P.W.R. 1919 ; 50 I.O. 401 ; 47 A. 872. Where the execution application is dismissed for non-appearance of parties by a mistake of the court, it has inherent power to restore it to file. 8 S.L.R. 327 ; 15 Bom. L.R. 645 (P.O.) A Court has inherent jurisdiction under S. 151, C. P. Code to restore an application dismissed for default. 2 L. 66 ; 64 I.C. 420 ; 41 I.O. 586=21 C.W.N. 769 ; 29 I.C. 592=8 S.L.R. 327 ; 3 P.W.R. 1912 ; 13 I.C. 859. A dismissal of an execution application for default does not bar a fresh application under O. 17, r. 2 or 3, 18 M. 131 ; *contra* was held in 15 A. 49, which is no longer good law. When the objections of a judgment-debtor to execution is dismissed for default it cannot be restored under O. 9, r. 9. The Court may under its inherent powers under section 151 restore the objection application. 21 C.W.N. 769 ; 41 I.O. 586.

SETTING ASIDE EXPERT ORDERS IN EXECUTION.—O. 9, r. 13, has no application to execution proceedings and an order setting aside the *ex-parte* proceeding cannot be made under this rule. 41 C. 1; 4 Pat. L.J. 135; 4 Pat. L.J. 33; 47 M.L.J. 269; 81 I.C. 841. A contrary view is taken in 37 M. 462 and held that such an order can be made under O. 9, r. 13. 5 L.W. 124; 37 I.C. 229. But the Court may make such an order under section 151, O.P. Code under its inherent powers. 62 I.C. 113=2 Pat. L.T. 270.

ABATEMENT OF PROCEEDINGS BY DEATH, OR INSOLVENCY.—Nothing in rules 3, 4 and 8 of order 22 shall apply to proceedings in execution of a decree or order. (O. 22, r. 12.)

Under the old Code there was a conflict of decisions which is set at rest by the above rule newly added in the present Code. See 31 M. 77; 3 A. 759; 6 A. 255; 12 A. 440; 23 C. 686; 3 B. 221; 19 B. 276; 10 A. 97 and 23 C. 374; 30 C. 961; 20 A. 38; 6 M. 180; 15 M. 399. Therefore the provisions relating to abatement do not apply to execution proceedings or to appeals from orders in the execution proceedings. 74 I.C. 577=1923 L. 560; 50 C. 650; 42 A. 570; 10 I.C. 405; 174 P.L.R. 1911. It is held, however, that the decree-holder should apply within six months of the death of the judgment-debtor to bring his legal representatives on the record, on the analogy of O. 22, r. 4. 62 I.C. 52; 75 I.C. 863=5 Pat. L.T. 233; 64 I.C. 359=16 P.L.R. 1922; 75 I.C. 46=(1923) M.W.N. 817.

WITHDRAWAL AND ADJUSTMENT OF EXECUTION PROCEEDINGS.—Nothing in order 23 shall apply to any proceeding in execution of a decree or order. (O. 23, r. 4.)

72 I.C. 477; 36 A. 172; 15 M.L.T. 100; 80 I.C. 454.

When an application for execution is withdrawn without permission of the Court to bring a fresh application, it is no bar to put in a subsequent application. 15 M.L.T. 100. An adjustment of the decree altering its terms is not permissible and does not extend the period of limitation for execution. 72 I.C. 477. There is nothing in the Code to prevent the decree-holder from withdrawing his application for execution. 1 P. 232; (1922) Pat. 525; (1891) A.W.N. 164; 10 A. 71; 15 M. 240; 10 B. 62; 18 C. 462; 18 C. 515; 36 A. 172; (1914) M.W.N. 159; 79 I.C. 1002=20 N.L.R. 106; 65 I.C. 122. The Court has no jurisdiction to proceed to sell the property of the judgment-debtor after the decree-holder has applied for withdrawal of the application. 1 P. 232.

REVIEW.—An order dismissing an execution application is liable to review under order 47, O.P. Code. 2 C.W.N. 606; 10 C. 538; also see other rulings cited in this Chapter.

Title

Author

Accession No.

Call No.

Today

Borrower's
No.

Issue
Date

Borrower's
No.

Issue
Date

[Redacted]

[Redacted]

APPENDIX.

FORMS.

APPENDIX E OF C.P. CODE.

No. 1.

NOTICE TO SHOW CAUSE WHY A PAYMENT OR ADJUSTMENT
SHOULD NOT BE RECORDED AS CERTIFIED.

(O. 21, r. 2.)

(Title.)

To

WHEREAS in execution of the decree in the above-named suit
has applied to this Court that the sum of Rs.

recoverable under the decree has been $\frac{\text{paid}}{\text{adjusted}}$ and should be recorded
as certified, this is to give you notice that you are to appear before this
Court on the _____ day of _____ 19____, to show
cause why the $\frac{\text{payment}}{\text{adjustment}}$ aforesaid should not be recorded as certified.

GIVEN under my hand and the seal of the Court, this
day of _____ 19____.

Judge.

No. 2.

PRECEPT. (Section 46).

(Title.)

UPON hearing the decree-holder it is ordered that this precept be sent
to the Court of _____ at _____
under section 46 of the Code of Civil Procedure, 1908, with directions to
attach the property specified in the annexed schedule and to hold the
same pending any application which may be made by the decree-holder
for execution of the decree.

Schedule.

Dated the _____ day _____ 19____.

Judge.

No. 3.

ORDER SENDING DECREE FOR EXECUTION TO ANOTHER COURT.
(O. 21, r. 6.)

(Title.)

WHEREAS the decree-holder in the above suit has applied to this
Court for a certificate to be sent to the Court of _____
at _____ for execution of the decree in the

above suit by the said Court, alleging that the judgment debtor resides or has property within the local limits of the jurisdiction of the said Court, and it is deemed necessary and proper to send a certificate to the said Court under Order XXI, rule 6, of the Code of Civil Procedure, 1908, it is

Ordered :

That a copy of this order be sent to with a copy of the decree and of any order which may have been made for execution of the same and a certificate of non-satisfaction.

Dated the _____ day of _____ 19 .
Judge.

No. 4.

CERTIFICATE OF NON-SATISFACTION OF DECREE. (O. 21, r. 6.)

(Title.)

CERTIFIED that no¹ satisfaction of the decree of this Court in Suit No. _____ of 19 _____, a copy of which is hereunto attached, has been obtained by execution within the jurisdiction of this Court.

Dated the _____ day of _____ 19 .
Judge.

¹ If partial, strike out "no" and state to what extent.

No. 5.

CERTIFICATE OF EXECUTION OF DECREE TRANSFERRED TO ANOTHER COURT. (O. 21, r. 6.)

(Title.)

Number of suit and the Court by which the decree was passed.	Names of parties.	Date of application for execution.	Number of the execution case.	Process issued and dates of service thereof.	Costs of execution.	Amount realized.	How the case is disposed of.	REMARKS.
1	2	3	4	5	6	7	8	9
				R. a. p.		R. a. p.		

Signature of Muharrir in charge.

Signature of Judge.

No. 6.

APPLICATION FOR EXECUTION OF DECREE. (O. 21, r. 11.)
In the Court of

I, _____, decree-holder, hereby apply for execution of the
decree hereinbelow set forth:—

No. of suit.	Names of parties.	Date of decree.	Whether any appeal preferred from decree	Payment or adjustment made, if any.	Previous application, if any, with date and result.	Amount with interest due upon the decree or other relief granted thereby together with particulars of any cross decree.	Amount of cost, if any awarded.	Against whom to be executed.	Mode in which the assistance of the Court is required.
1	2	3	4	5	6	7	8	9	10
789 of 1897	A. B.—Plaintiff, C. D.—Defendant.	October 11th, 1897.	No.	None.	Rs. 72 4 recorded on application, dated the 4th March, 1899.	Rs. 914-8-2 principal (interest at 6 per cent, per annum, from date of decree till payment.	Rs. A. P. As awarded in the decree ... 47 10 4 Subsequently incurred ... 8 2 0 Total ... 55 12 4	Against the defendant C. D.	(When attachment and sale of moveable property is sought.) I pray that the total amount of Rs. (together with interest on the principal sum up to date of payment) and the costs of taking out this execution, be realized by attachment and sale of defendant's moveable property as per annexed list and paid to me. (When attachment and sale of immoveable property is sought.) I pray that the total amount of Rs. (together with interest on the principal sum up to date of payment) and the costs of taking out this execution, be realized by the attachment and sale of defendant's immoveable property specified at the foot of this application and paid to me.

I declare that what is stated herein is true to the best of my knowledge and belief.

Signed

, decree-holder.

Dated the _____ day of _____ 19 ____.

[When attachment and sale of immoveable property is sought]
Description and Specification of Property.

The undivided one-third share of the judgment-debtor in a house situated in the village of _____, value Rs. 40, and bounded as follows:—

East by G's house; west by H's house; south by public road; north by private lane and J's house.

I declare that what is stated in the above description is true to the best of my knowledge and belief, and so far as I have been able to ascertain the interest of the defendant in the property therein specified.

Signed

, decree-holder.

No. 7.

NOTICE TO SHOW CAUSE WHY EXECUTION SHOULD NOT ISSUE.
(O. 21, r. 16.)
(Title.)

To

WHEREAS
has made application to this Court for execution of decree in Suit No. of 19 on the allegation that the said decree has been transferred to him by assignment, this is to give you notice that you are to appear before this Court on the day of 19, to show cause why execution should not be granted.

GIVEN under my hand and the seal of the Court, this day of 19.

Judge.

No. 8.

WARRANT OF ATTACHMENT OF MOVEABLE PROPERTY IN EXECUTION
OF A DECREE FOR MONEY. (O. 21, r. 30.)
(Title.)

To

The Bailiff of the Court.

WHEREAS was ordered by decree of this Court passed on the day of 19, in Suit No.

DECREE.				
Principal	...			
Interest	...			
Costs	...			
Costs of execution	...			
Further interest	...			
Total	...			

of 19, to pay to the plaintiff the sum of Rs. as noted in the margin; and whereas the said sum of Rs. has not been paid; These are to command you to attach the immoveable property of the said as set forth in the schedule hereunto annexed, or which shall be pointed out to you by the said

and unless the said shall pay to you the said sum of Rs. together with Rs. the costs of this attachment, to hold the same until further orders from this Court.

You are further commanded to return this warrant on or before the day of 19, with an endorsement certifying the day on which and manner in which it has been executed, or why it has not been executed.

GIVEN under my hand and the seal of the Court, this day of 19.

Schedule

Judge.

No. 9.

WARRANT FOR SEIZURE OF SPECIFIC MOVEABLE PROPERTY
ADJUDGED BY DECREE. (O. 21, r. 31.)
(Title.)

To

The Bailiff of the Court.

WHEREAS was ordered by decree of this Court
passed on the day of 19 , in Suit No.
of 19 , to deliver to the plaintiff the moveable property (or
a share in the moveable property) specified in the schedule
hereunto annexed, and whereas the said property (or share) has not been
delivered ;

These are to command you to seize the said moveable property (or a
share of the said moveable property) and to deliver it
to the plaintiff or to such person as he may appoint in his behalf.

GIVEN under my hand and the seal of the Court, this day of
19 .

*Schedule.**Judge.*

No. 10.

NOTICE TO STATE OBJECTIONS TO DRAFT OF DOCUMENT.
(O. 21, r. 34.)
(Title.)

To

TAKE notice that on the day of 19 ,
the decree-holder in the above suit presented an application to this
Court that the Court may execute on your behalf a deed of
whereof a draft is hereunto annexed, of the immoveable property specified
hereunder, and that the day of 19 is
appointed for the hearing of the said application, and that you are at
liberty to appear on the said day and to state in writing any objections
to the said draft.

Description of Property.

GIVEN under my hand and the seal of the Court, this
day of 19 .

Judge.

No. 11.

WARRANT TO THE BAILIFF TO GIVE POSSESSION OF LAND, ETC.
(O. 21, r. 35.)
(Title.)

To

The Bailiff of the Court.

WHEREAS the undermentioned property in the occupancy of
has been decreed to
the plaintiff in this suit ; You are hereby
directed to put the said in possession of the same, and you are

hereby authorized to remove any person bound by the decree who may refuse to vacate the same.

GIVEN under my hand and the seal of the Court, this day of
19 .

Schedule.

Judge. ♦

—
No. 12.

NOTICE TO SHOW CAUSE WHY WARRANT OF ARREST SHOULD
NOT ISSUE. (O. 21, r. 27.)

(Title.)

To

WHEREAS has made application to
this Court for execution of decree in Suit No. of 19 , by
arrest and imprisonment of your person you are hereby required to appear
before this Court on the day of 19 to show
cause why you should not be committed to the civil prison in execution
of the said decree.

GIVEN under my hand and the seal of the Court, this day of
19 .
Judge.

—
No. 13.

WARRANT OF ARREST IN EXECUTION. (O. 21, r. 38.)

(Title.)

To

The Bailiff of the Court.

WHEREAS
of the Court in Suit No.

Principal	...			
Interest	...			
Costs	...			
Execution	...			
Total	...			

was adjudged by a decree
of 19 , dated the

day of

19 , to pay to the

decree-holder the sum of Rs.

as noted in the margin, and whereas
the said sum of Rs. has not

been paid to the said decree-holder in
satisfaction of the said decree, these are

to command you to arrest the said
judgment-debtor and unless the said

judgment-debtor shall pay to you the said sum of Rs.
together with Rs. for the costs of executing this process, to

bring the said defendant before the Court with all convenient speed. You
are further commanded to return the warrant on or before the

day of 19 , with an endorsement certifying
the day on which and manner in which it has been executed, or the reason
why it has not been executed.

GIVEN under my hand and the seal of the Court, this
day of 19 .

Judge.

No. 14.

WARRANT OF COMMITTAL OF JUDGMENT-DEBTOR TO JAIL.
(O. 21, r. 40.)
(Title.)

To

The Officer in charge of the Jail at

WHEREAS _____ who has
been brought before this Court this _____ day of
19 _____, under a warrant in execution of a decree which was
made and pronounced by the said Court on the _____ day of
19 _____, and by which decree it was ordered that the said
_____ should pay _____

And whereas the said _____ has not
obeyed the decree nor satisfied the Court that he is entitled to be
discharged from custody; You are hereby, in the name of the King-
Emperor of India, commanded and required to take and receive the said
_____ into the civil prison and keep him imprisoned
therein for a period not exceeding _____ or until the said decree
shall be fully satisfied, or the said _____ shall be otherwise
entitled to be released according to the terms and provisions of section 58
of the Code of Civil Procedure, 1908; and the Court does hereby fix
_____ annas per diem as the rate of the monthly allowance
for the subsistence of the said _____
during the confinement under this warrant of committal.

GIVEN under my signature and the seal of the Court, this _____ day of _____ 19 _____ Judge.

No. 15.

ORDER FOR THE RELEASE OF A PERSON IMPRISONED IN
EXECUTION OF A DECREE. (Sections 58, 59.)
(Title.)

To

The Officer in charge of the Jail at

UNDER orders passed this day, you are hereby directed to set free
judgment-debtor now in your custody.

Judge.

Dated

ADDITIONAL RULES MADE BY THE MADRAS HIGH COURT:—
For the word "Dated" substitute the words "Given under my hand
and the seal of the Court, this _____ day of _____."

No. 15-A.

(Under the Madras High Court Rules.)

BOND FOR SAFE CUSTODY OF MOVEABLE PROPERTY ATTACHED AND
LEFT IN CHARGE OF PERSON INTERESTED AND SURETIES. (O. 21, r. 43).

IN the Court of _____ at _____
Civil Suit No. _____

A. B. of

against

... of 19 _____
... Plaintiff.

C. D. of

... Defendant.

Know all men by these presents that we I.J., of etc., and K. L. of etc., and M. H. of etc., are jointly and severally bound to the Judge of the Court of in Rupees to be paid to the said Judge, for which payment to be made we bind ourselves, and each of us, in the whole, our and each of our heirs, executors and administrators, jointly and severally by these presents.

Dated this day of 19 .

And WHEREAS the moveable property specified in the schedule hereunto annexed has been attached under a warrant from the said Court dated the day of 19 in execution of a decree in favour of in Suit No. of 19 on the file of and the said property has been left in the charge of the said I.J.

Now the condition of this obligation is, that if the above bounden I.J. shall duly account for and produce when required before the said Court all and every the said property aforesaid and shall obey any further order of the Court in respect thereof, then this obligation shall be void: otherwise it shall remain in force.

I.J., K.L., M.N.

SIGNED and delivered by the above bounden in the presence of

No. 16.

ATTACHMENT IN EXECUTION.
PROHIBITORY ORDER, WHERE THE PROPERTY TO BE ATTACHED
CONSISTS OF MOVEABLE PROPERTY TO WHICH THE DEFENDANT
IS ENTITLED SUBJECT TO A LIEN OR RIGHT OF SOME
OTHER PERSON TO THE IMMEDIATE POSSESSION
THEREOF (O. 21, r. 46.)

(Title.)

To

WHEREAS
has failed to satisfy a decree passed against on the
day of 19 , in Suit No. of
19 . in favour of for Rs. ;
It is ordered that the defendant be, and is hereby, prohibited and restrained, until the further order of this Court, from receiving from
the following property in the possession of the said
, that is to say,

to which the defendant is entitled, subject to any claim of the said
and the said is hereby prohibited and restrained,
until the further order of this Court, from delivering the said property to
any person or persons whomsoever.

GIVEN under my hand and the seal of the Court, this day
of 19 .

Judge.

No. 17.

ATTACHMENT IN EXECUTION.
PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF DEBTS
NOT SECURED BY NEGOTIABLE INSTRUMENTS. (O. 21, r. 46.)

(Title.)

To

WHEREAS _____ has failed
to satisfy a decree passed against _____ on the _____
day of _____ 19____, in Suit No. _____ of 19____,
in favour of _____ for Rs. _____; It is ordered
that the defendant be, and is hereby, prohibited and restrained, until the
further order of this Court, from receiving from you a certain debt alleged
now to be due from you to the said defendant, namely,
_____ and that you, the said
be, and you are hereby, prohibited and restrained, until the further
order of this Court, from making payment of the said debt, or any part
thereof, to any person whomsoever or otherwise than into this Court.

GIVEN under my hand and the seal of the Court, this _____ day of
19____.

Judge.

No. 18.

ATTACHMENT IN EXECUTION.
PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF SHARES
IN THE CAPITAL OF A CORPORATION. (O. 21, r. 46.)

(Title.)

To

Defendant and to
Corporation.

WHEREAS _____ Secretary of _____
against _____ has failed to satisfy a decree passed
on the _____ day of _____
19____, in Suit No. _____ of 19____, in favour of _____
for Rs. _____; It is ordered that you, the defendant,
be, and you are hereby, prohibited and restrained, until the further order of
this Court, from making any transfer of _____ shares in the
aforesaid Corporation, namely, _____, or from receiving
payment of any dividends thereon; and you,
the Secretary of the said Corporation, are hereby prohibited and restrained
from permitting any such transfer or making any such payment.

GIVEN under my hand and the seal of the Court, this _____ day
19____.

Judge.

person addressed on what account, etc.), I request that you will hold the said money subject to the further order of this Court.

I have the honour to be,

Sir,

Your most obedient servant,

Judge.

Dated the _____ day of _____ 19 .

No. 22.

NOTICE OF ATTACHMENT OF A DECREE TO THE COURT WHICH
PASSED IT. (O. 21, r. 53.)
(*Title.*)

To

The Judge of the Court of

SIR,

I have the honour to inform you that the decree obtained in your
Court on the _____ day
of _____ 19 , by
in Suit No. _____ of 19 , in which he was

and

was
has been attached by this Court on the application of _____ in the
suit specified above. You are therefore requested to stay the execution
of the decree of your Court until you receive an intimation from this Court
that the present notice has been cancelled or until execution of the said
decree is applied for by the holder of the decree now sought to be executed
or by his judgment-debtor.

I have the honour, etc.,

Judge.

Dated the _____ day of _____ 19 .

No. 23.

NOTICE OF ATTACHMENT OF A DECREE TO THE HOLDER OF THE
DECREE. (O. 21, r. 53.)
(*Title.*)

To

WHEREAS an application has been made in this Court by the decree-
holder in the above suit for the attachment of a decree obtained by you
on the _____ day
of _____ 19 , in the Court of _____ and

of 19 , in which _____ was

that you, the said

; It is ordered
, be, and you

are hereby, prohibited and restrained, until the further order of this Court, from transferring or charging the same in any way.

GIVEN under my hand and the seal of the Court, this
day of 19 .

Judge.

—
No. 24.

ATTACHMENT IN EXECUTION.
PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF
IMMOVEABLE PROPERTY. (O. 21, r. 54.)

(Title.)

To

Defendant.

WHEREAS you have failed to satisfy a decree passed against you
on the day of
19 , in Suit No.

of 19
in favour of
; It is ordered

for Rs.

that you, the said

be, and you are hereby, prohibited and restrained, until the further order
of this Court, from transferring or charging the property specified in the
schedule hereunto annexed, by sale, gift or otherwise, and that all persons
be, and that they are hereby, prohibited from receiving the same by
purchase, gift or otherwise.

GIVEN under my hand and the seal of the Court, this
day of 19.

Schedule.

Judge.

—
No. 25.

ORDER FOR PAYMENT TO THE PLAINTIFF, ETC., OF MONEY, ETC.,
IN THE HANDS OF A THIRD PARTY. (O. 21, r. 56.)

(Title.)

To

WHEREAS the following property
in execution of a decree in Suit No.
passed on the day of
for Rs.

property so attached, consisting of Rs.
Rs.

thereof to satisfy the said decree, shall be paid over by you, the said,
to

has been attached
of 19
19 , in favour of
; It is ordered that the

in money and

in currency-notes, or a sufficient part

GIVEN under my hand and the seal of the Court, this
day of 19 .

Judge.

No. 26.

NOTICE TO ATTACHING CREDITOR. (O. 21, r. 58)

(Title.)

To

WHEREAS _____ has made application to this Court placed at your instance of 19 _____, this is to
for the removal of attachment on _____
in execution of the decree in Suit No. _____
give you notice to appear before this Court on _____ day of _____ 19 _____,
the _____
either in person or by a pleader of the Court duly instructed to support
your claim, as attaching creditor.

GIVEN under my hand and the seal of the Court, this
day of _____ 19 _____.

Judge.

No. 27.

WARRANT OF SALE OF PROPERTY IN EXECUTION OF A DECREE
FOR MONEY. (O. 21, r. 66.)

(Title.)

To

The Bailiff of the Court.

THESE are to command you to sell by auction, after giving
_____ days' previous notice, by affixing the same in this Court-house
and after making due proclamation, the
property attached under a warrant from _____
this Court, dated the _____ day of _____ 19 _____, in
execution of a decree in favour of _____ in Suit No. _____
of 19 _____, or so much of the said property as shall realize the sum of _____
Rs. _____, being the _____ of the said decree and
costs still remaining unsatisfied.

You are further commanded to return this warrant on or before the
_____ day of _____ 19 _____, with an
endorsement certifying the manner in which it has been executed, or the
reason why it has not been executed.

GIVEN under my hand and the seal of the Court, this
day of _____ 19 _____.

Judge.

No. 28.

NOTICE OF THE DAY FIXED FOR SETTLING A SALE PROCLAMATION.
(O. 21, r. 66.)

(Title.)

To

Judgment-debtor.
the decree-holder,

WHEREAS in the above-named suit
has applied for the sale of _____

You are hereby informed
that the _____

_____ day of _____ 19 _____, has
been fixed for settling the terms of the proclamation of sale.

GIVEN under my hand and the seal of the Court, this
day of _____ 19 _____.

Judge.

No. 29.

PROCLAMATION OF SALE. (O. 21, r. 66.)

(Title.)

NOTICE hereby given that, under rule 64 of Order XXI of the Code of Civil Procedure, 1908, an order has been passed by this Court for the sale of the attached property mentioned in the annexed schedule, in satisfaction of the claim of the decree-holder in the suit ⁽¹⁾ mentioned in the margin, amounting with costs and interest up to date of sale to the sum of

(1) Suit No. of 19 , decided by the of in which was plaintiff and was defendant.

The sale will be by public auction, and the property will be put up for sale in the lots specified in the schedule. The sale will be of the property of the judgment-debtors above-named as mentioned in the schedule below; and the liabilities and claims attaching to the said property, so far as they have been ascertained, are those specified in the schedule against each lot.

In the absence of any order of postponement, the sale will be held by at the monthly sale commencing at o'clock on the at

. In the event, however, of the debt above specified and of the costs of the sale being tendered or paid before the knocking down of any lot, the sale will be stopped.

At the sale the public generally are invited to bid, either personally or by duly authorized agent. No bid by, or on behalf of, the judgment-creditors above-mentioned, however, will be accepted, nor will any sale to them be valid without the express permission of the Court previously given. The following are the further

Conditions of Sale.

1. The particulars specified in the schedule below have been stated to the best of the information of the Court, but the Court will not be answerable for any error, misstatement or omission in this proclamation.

2. The amount by which the biddings are to be increased shall be determined by the officer conducting the sale. In the event of any dispute arising as to the amount bid, or as to the bidder, the lot shall at once be again put up to auction.

3. The highest bidder shall be declared to be the purchaser of any lot, provided always that he is legally qualified to bid, and provided that it shall be in the discretion of the Court or officer holding the sale to decline acceptance of the highest bid, when the price offered appears so clearly inadequate as to make it advisable to do so.

4. For reasons recorded, it shall be in the discretion of the officer conducting the sale to adjourn it subject always to the provisions of rule 69 of Order XXI.

5. In the case of moveable property, the price of each lot shall be paid at the time of sale or as soon after as the officer holding the sale directs, and in default of payment the property shall forthwith be again put up and re-sold.

6. In the case of immovable property, the person declared to be the purchaser shall pay immediately after such declaration a deposit of

25 per cent. on the amount of his purchase-money to the officer conducting the sale, and in default of such deposit the property shall forthwith be put up again and re-sold.

7. The full amount of the purchase-money shall be paid by the purchaser before the Court closes on the fifteenth day after the sale of the property exclusive of such day, or if the fifteenth day be a Sunday or other holiday, then on the first office day after the fifteenth day.

8. In default of payment of the balance of purchase-money within the period allowed, the property shall be re-sold after the issue of a fresh notification of sale. The deposit, after defraying the expenses of the sale, may, if the Court thinks fit, be forfeited to Government and defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may be subsequently sold.

GIVEN under my hand and the seal of the Court, this
day of 19 .

Judge.

Schedule of Property.

Number of lot.	Description of property to be sold, with the name of each owner where there are more judgment debtors than one.	The revenue assessed upon the estate or part of the estate, if the property to be sold is an interest in an estate or a part of an estate paying revenue to Government.	Detail of any incumbrances to which the property is liable.	Claims, if any, which have been put forward to the property and any other known particulars bearing on its nature and value.

(Under the Madras High Court Rules).

"These title deeds relating to the property have not been filed in Court, and the purchaser will take the property subject to the risk of there being mortgages by deposit of title deeds or mortgages not disclosed in the encumbrance certificate."

No. 30.

ORDER ON THE NAZIR FOR CAUSING SERVICE OF PROCLAMATION
OF SALE. (O. 21, r. 66.)

(Title.)

To

The Nazir of the Court.

WHEREAS an order has been made for the sale of the property of the judgment debtor specified in the schedule hereunder annexed, and whereas the day of 19 , has been fixed for the sale of the said property, copies of the proclamation of sale are by this warrant made over to you, and you are hereby ordered to have the proclamation published by beat of drum within each of the properties specified in the said schedule, to affix a copy of the said proclamation on a conspicuous part of each of the said properties and afterwards on the Court-house, and then to submit

to this Court a report showing the dates on which and the manner in which the proclamations have been published.

Dated the _____ day of _____ 19 .
Schedule.

Judge.

No. 31.

CERTIFICATE BY OFFICER HOLDING A SALE OF THE DEFICIENCY
OF PRICE ON A RE-SALE OF PROPERTY BY REASON OF THE
PURCHASER'S DEFAULT. (O. 21, r. 71.)

(Title.)

Certified that at the re-sale of the property in execution of the decree in the above-named suit, in consequence of default on the part of purchaser, there was a deficiency in the price of the said property amounting to Rs. _____ and that the expenses attending such re-sale amount to Rs. _____ making a total of Rs. _____ which sum is recoverable from the defaulter.

Dated the _____ day of _____ 19 .
Officer holding the sale.

No. 32.

NOTICE TO PERSON IN POSSESSION OF MOVEABLE PROPERTY SOLD IN
EXECUTION. (O. 21, r. 79.)

(Title.)

To

WHEREAS _____ has become the purchaser at a public sale in execution of the decree in the above suit of _____ now in your possession, you are hereby prohibited from delivering possession of the said _____ to any person except the said _____.

GIVEN under my hand and the seal of the Court this
day of _____ 19 .

Judge.

No. 33.

PROHIBITORY ORDER AGAINST PAYMENT OF DEBTS SOLD IN
EXECUTION TO ANY OTHER THAN THE PURCHASER. (O. 21, r. 79.)

(Title.)

To

WHEREAS _____ has become the purchaser at a public sale in execution of the decree in the above suit of _____ and to _____ being debts due from you _____

It is ordered that you _____ be, and you are hereby, prohibited from receiving, and you _____ from making payment of, the said debt to any person or persons except the said _____

GIVEN under my hand and the seal of the Court, this
day of _____ 19 .

Judge.

No. 34.

PROHIBITORY ORDER AGAINST THE TRANSFER OF SHARES SOLD IN
EXECUTION. (O. 21, r. 79.)

(Title.)

To

and , Secretary of
Corporation.

WHEREAS has become the purchaser
at a public sale in execution of the decree, in the above suit, of certain
shares in the above Corporation, that is to say, of
standing in the name of you ;
It is ordered that you be, and you are hereby, prohibit-
ed from making any transfer of the said shares to any person except the
said the purchaser aforesaid or from receiving any divi-
dends thereon ; and you
Secretary of the said Corporation, from permitting any such transfer or
making any such payment to any person except the said
, the purchaser aforesaid.

GIVEN under my hand and the seal of the Court, this
day of 19 .

Judge.

No. 35.

CERTIFICATE TO JUDGMENT-DEBTOR AUTHORISING HIM TO
MORTGAGE, LEASE OR SELL PROPERTY. (O. 21, r. 83.)

(Title.)

WHEREAS in execution of the decree passed in the above suit an
order was made on the day of 19
for the sale of the undermentioned property of the judgment-debtor
, and whereas the Court has, on the
application of the judgment-debtor, postponed the said sale to enable him
to raise the amount of the decree by mortgage, lease or private sale of the
said property or of some part thereof :

This is to certify that the Court doth hereby authorise the said judg-
ment-debtor to make the proposed mortgage, lease or sale within a period
of from the date of this certificate :
provided that all monies payable under such mortgage, lease or sale shall
be paid into this Court and not to the said judgment-debtor.

Description of property.

GIVEN under my hand and the seal of the Court, this
day of 19 .

Judge.

No. 36.

NOTICE TO SHOW CAUSE WHY SALE SHOULD NOT BE SET ASIDE.
(O. 21, rr. 90, 92.)

(Title.)

To

WHEREAS the undermentioned property was sold on the
day of 19 in execution of the decree

passed in the above-named suit, and whereas the decree-holder (or judgment-debtor), has applied to this Court to set aside the sale of the said property on the ground of a material irregularity (or fraud) in publishing (or conducting) the sale, namely, that

Take notice that if you have any cause to show why the said application should not be granted, you should appear with your proofs in this Court on the _____ day of _____ 19____, when the said application will be heard and determined.

GIVEN under my hand and the seal of the Court, this
day of _____ 19____.

Description of property.

Judge.

— — —
No. 37.

NOTICE TO SHOW CAUSE WHY SALE SHOULD NOT BE SET ASIDE.
(O. 21, rr. 91, 92.)

(Title.)

To

WHEREAS _____, the purchaser of the under-mentioned property sold on the _____ day of _____ 19____, in execution of the decree passed in the above-named suit, has applied to this Court to set aside the sale of the said property on the ground that _____, the judgment-debtor, had no saleable interest therein.

Take notice that if you have any cause to show why the said application should not be granted, you should appear with your proofs in this Court on the _____ day of _____ 19____, when the said application will be heard and determined.

GIVEN under my hand and the seal of the Court, this
day of _____ 19____.

Description of property.

Judge.

— — —
No. 38.

CERTIFICATE OF SALE OF LAND. (O. 21, r. 94.)

(Title.)

THIS is to certify that _____ has been declared the purchaser at a sale by public auction on the _____ day of _____ 19____, of _____ in execution of decree in this suit, and that the said sale has been duly confirmed by this Court.

GIVEN under my hand and the seal of the Court, this
day of _____ 19____.

Judge.

No. 39.

ORDER FOR DELIVERY TO CERTIFIED PURCHASER OF LAND AT A
SALE IN EXECUTION. (O. 21, r. 95.)

(Title.)

To

The Bailiff of the Court.

WHEREAS _____ has become the
certified purchaser of _____ at a sale in exe-
cution of decree in Suit No. _____ of 19 ____; You are hereby ordered to
put the said _____, the certified purchaser, as
aforesaid, in possession of the same.

GIVEN under my hand and the seal of the Court, this
day of _____ 19 ____.

Judge.

No. 40.

SUMMONS TO APPEAR AND ANSWER CHARGE OF OBSTRUCTING
EXECUTION OF DECREE. (O. 21, r. 97.)

(Title.)

To

WHEREAS _____, the
decree-holder in the above suit, has complained to this Court that you
have resisted (or obstructed) the officer charged with the execution of the
warrant for possession;

You are hereby summoned to appear in this Court on the
day of _____ 19 ____ at _____ A.M., to answer the said complaint.

GIVEN under my hand and the seal of the Court, on the
day of _____ 19 ____.

Judge.

No. 41.

WARRANT OF COMMITTAL. (O. 21, r. 98.)

(Title.)

To

The Officer in charge of the Jail at

WHEREAS the undermentioned property has been decreed to
the plaintiff in this suit, and whereas the Court is satisfied that
_____ without any just cause resisted (or obstructed) and is still resist-
ing (or obstructing) the said _____ in obtaining possession of the pro-
perty, and whereas the said _____ has made application to this Court
that the said _____ be committed to the civil prison;

You are hereby commanded and required to take and receive the said
_____ into the civil prison and to keep him imprisoned therein for
the period of _____ days.

GIVEN under my hand and the seal of the Court this
day of _____ 19 ____.

Judge.

No. 42.

AUTHORITY OF THE COLLECTOR TO STAY PUBLIC SALE OF LAND.
(Section 72.)

(Title.)

To

Collector of

SIR,

In answer to your communication, No. , dated ,
representing that the sale in execution of the decree in this suit of
land situate within your district is objectionable, I have the honour to
inform you that you are authorised to make provision for the satisfaction
of the said decree in the manner recommended by you.

I have the honour to be,

SIR,

Your obedient servant,

Judge.

No. 43.

(Under the Allahabad High Court Rules.)

The security to be furnished under section 55 (4) shall be, as nearly
as may be, by a bond in the following form:—

IN the Court of at

Suit No.

of 19 .

A.B. of

... Plaintiff.

against

C.D. of

... Defendant.

WHEREAS in execution of the decree in the suit aforesaid, the said
C.D. has been arrested under a warrant and brought before the Court
of and whereas the said C.D. has applied for his discharge on the
ground that he undertakes within one month to apply under section 5 of
Act III of 1907 to be declared an insolvent and the said Court has ordered
that the said C.D. shall be released from custody if the said C.D. furnish
good and sufficient security in the sum of Rs. , that he will appear
when called upon, and that he will within one month from this date apply
under section 5 of Act III of 1907, to be declared an insolvent ;

Therefore I, E.F. inhabitant of have voluntarily become
security, and do hereby bind myself, my heirs and executors to
as Judge of the said Court and his successors in office that the said
C.D. will appear at any time when called upon by the said Court, and
will apply in the manner and within the time hereinbefore set forth, and
in default of such appearance or of such application, I bind myself, my
heirs and executors, to pay to the said Court on its order, the sum of
Rs. .

WITNESS my hand at this day of 19 .

(Sd.) E.F.,

Surety.

Witnesses.

LIST A.

LIST OF SCHEDULED DISTRICTS AS DEFINED IN SECTION (1) OF THE SCHEDULED DISTRICTS ACT, XIV OF 1874.

I.—SCHEDULED DISTRICTS, MADRAS.

(i) *In Ganjam.*

- (1) The Gumsur Maliahs, including Chokapad.
- (2) The Surada Maliahs.
- (3) The Chinna Kimedi Maliahs.
- (4) The Pedda Kimedi Maliahs.
- (5) The Bodaguda Maliahs.
- (6) Parlakimedi Maliahs.
- (7) The Muttas of Korada and Ronaba (otherwise called Srikarmo).
- (8) *Repealed.*
- (9) The Jurada Maliah.
- (10) The Jалантра Maliah.
- (11) The Mandasa Maliah.
- (12) The Budarsinghi Maliah.
- (13) The Kutengia Maliah.

(ii) *In Vizagapatam.*

- (1) The Jeypur Zamindari.
- (2) Golconda Hills, west of the River Boderu.
- (3) The Madugol Maliahs.
- (4) The Kasipur Zamindari.
- (5) The Panchipenta Maliahs.
- (6) Mondemkolla, in the Meranji Zamindari.
- (7) The Konda Mutta of Merangi.
- (8) The Gumma and Konda Muttas of Kurpam.
- (9) The Kottam, Ram and Konda Muttas of Palkonda.

(iii) *In the Godavari District.*

- (1) The Bhadrachalam Taluk.
- (2) The Rakapilli Taluk.
- (3) The Rampa Country.

(iv) *In the Indian Ocean.*

The Laccadive Islands, including Minicoy.

II.—SCHEDULED DISTRICTS, BOMBAY.

- (i) The Province of Sindh.
- (ii) *Repealed.*
- (iii) Aden.
- (iv) The villages belonging to the following Mehwasssi Chiefs :—
 - (1) The Parvi of Kathi.
 - (2) The Parvi of Nal.
 - (3) The Parvi of Singapur.
 - (4) The Walwi of Gaohalli.
 - (5) The Wassawa of Chikhli.
 - (6) The Parvi of Nawalpur.

III.—SCHEDULED DISTRICTS, BENGAL.

- (i) The Jalpaiguri and Darjeeling Districts.
- (ii) The Hill Tracts of Chittagong.
- (iii) The Sonthal Parganas.
- (iv) The Chota Nagpur Division.
- (v) The Mahal of Augul.

IV.—SCHEDULED DISTRICTS, UNITED PROVINCES.

- (i) *Repealed.*
- (ii) The Province of Kumaon and Gartwal.
- (iii) The Tarai Parganas, comprising—Bazpur, Kashipur, Jaspur, Rudarpur, Gadarpur, Kilpuri, Nanak—Mattha and Bilheri.
- (iv) In the Mirzapur District :—
 - (1) The tappas of Agori Khas and South Kon in the Pargana of Agori.
 - (2) The tappa of British Singrauli in the Pargana of Singrauli.
 - (3) The tappas of Phulwa, Dudhi and Barha in the Pargana of Biohipur.
 - (4) The portion lying to the South of the Kaimor Range.
- (v) *Repealed.*
- (vi) The tract of country known as Jaunsar Bawar in the Dehra Dun District.

V.—SCHEDULED DISTRICTS, PUNJAB.

The Districts of Hazari, Peshawar, Kohat, Bannu, Dera Ismail Khan, Dera Ghazi Khan, Lahaul and Spiti.

VI.—SCHEDULED DISTRICTS, CENTRAL PROVINCES.

Chhattisgarh Zamindaris, viz. :—

- | | |
|---------------------|-------------------|
| 1. Khariar. | 13. Matin. |
| 2. Bindra Nawagarh. | 14. Uprora. |
| 3. Sahezipur. | 15. Kenda. |
| 4. Gandai. | 16. Lapha. |
| 5. Silhatt. | 17. Ohhuri. |
| 6. Barbaspur. | 18. Corba. |
| 7. Thakurtola. | 19. Chapa. |
| 8. Lohara. | 20. Bora Sambhar. |
| 9. Gondardehi. | 21. Phuljhar. |
| 10. Fingeswar. | 22. Kolabira. |
| 11. Pandaria. | 23. Rampur. |
| 12. Pendra. | |

Chanda Zemindaris.

- | | |
|---------------|-------------------|
| 1. Abiri. | 11. Maramgaon. |
| 2. Ambagarh. | 12. Panabarae. |
| 3. Anundhi. | 13. Palasgarh. |
| 4. Dhanora. | 14. Raagi. |
| 5. Dudhmala. | 15. Sirsundi. |
| 6. Gewarda. | 16. Sonsari. |
| 7. Jharapara. | 17. Obandala. |
| 8. Khutgaon. | 18. Gilgaon. |
| 9. Koracha. | 19. Pawi Mutanda. |
| 10. Kotgal. | 20. Palegaon. |

Chandwara Jagirdaris.

- | | |
|----------------|--------------------|
| 1. Harai. | 7. Paohmarhi. |
| 2. Ohhater. | 8. Partabgarh. |
| 3. Gorakhghat. | 9. Almod. |
| 4. Gorpani. | 10. Sonpur. |
| 5. Baktagorh. | 11. Bariam Pagara. |
| 6. Bordagarh. | |

VII.—THE CHIEF COMMISSIONER OF COORG.

VIII.—THE CHIEF COMMISSIONER OF ANDAMAN AND NICOBAR ISLANDS.

IX.—THE CHIEF COMMISSIONERSHIP OF AJMERE AND MARWARA.

X.—THE CHIEF COMMISSIONERSHIP OF ASSAM.

XI.—THE HILL TRACTS OF ARAKAN.

XII.—THE PARGANA OF MANPUR.

XIII.—[THE CANTONMENT OF MORAR] *Repealed.*

The following territories are also declared to be Scheduled Districts by virtue of the concluding portion of the third paragraph of Section 1, of the Scheduled Districts Act, 1874.

MADRAS.

In the Godavari Districts :—

- (1) The unsettled Government villages in the Yernagudem Taluk ;
- (2) The villages of the ex-Mansab of Jaddengi ;
- (3) The following petty proprietary estates, namely, Bayanagudam, Billamilli, Jangamredigudem, Gutala, Gangolu, Patteshim, Polavaram, Petta, Dangengi, Viravaram and Davepatnam.
- (4) The following villages of the Yernagudem Taluk :—
 - (a) The settled Government villages of Ganapavaram, Taduvaya and Parimpudi ;
 - (b) The Agraharams of Ragolopalli, Saggonda, Dondapudi, Palacherla, Rajavaram, Ayyanani, Polavaram, Srinivasapuram, Pallipudi, Ramanujapuram and Kristnapuram ;
- (5) The following villages of Rajahmundry Taluk :—
 - (c) The Lakkonda Sima of Gangaram, Lakkonda, Pidatamamidi, Vanayapadu, Vojubanda, Potamdorapallam, Jaggampalam, Jiyyampallam, Rajaram, Neladonalapadu, Kondalapallam, Kumarapadu, Pajupeta Lodi, Yannapalli, Vunmetta, Chodaram, Loddepallam, Rajanpallam, Botireddi, Sivanpatnam, Godichinnampallam, Mattepadu, Kundumullapallam, Vemmalana, Auttagondi Bandam, Vayyalanadugu, Agraharapadu, Pedagarlapadu, Goragumovi, Pundapottipallam, Kusamaranja, Amudalabandu, Doramamidi, Yerrampallam, Kottada, Donalapalli, Surampallam, Chinagarlapadu ;

- (d) The unsettled independent villages of Boyyanapalli, Kotta-Ramavaram, Pata-Ramavaram, Uppulapadu, Narasapuram, Ravilanka, Pedda Bhimpalli, Nellapudi, Lingavararam, Moller, Kattumilli, Ramadevipuram and Dokulanda, Kistnavaram.

ASSAM.

The North Lushai Hills.
The Mokokchung Sub-division of the Naga Hills District.

BENGAL.

The Khondmals in Orissa.
The South Lushai Hills.

BURMA.

Upper Burma (except the Shan States).
The Chin Hills.

BRITISH BALUCHISTAN.

The territories for the time being under the administration of the Chief Commissioner of British Baluchistan. These territories include the tracts known as Peshin, Shararud, Kach, Kawas, Harnai, Sibi and Thal Chotiala.

LIST B.

SCHEDULED DISTRICTS IN WHICH THE SCHEDULED DISTRICTS ACT, 1874, HAS BEEN BROUGHT INTO FORCE BY NOTIFICATION UNDER SECTION 3 OF THE ACT.

MADRAS.

The Taluks of Bhadrachalam and Rakapilli and the Rampa Country.
The remaining Scheduled Districts of Madras as existing on the 19th February, 1889.

The villages in the Godavari District to which by Resolution the provisions were made applicable.

BOMBAY.

The Province of Sindh.
Aden.

The Island of Parein.

The villages belonging to the following Mehwassi Chiefs :—

- (1) The Parvi of Kathi.
- (2) The Parvi of Nal.
- (3) The Parvi of Singapur.
- (4) The Walvi of Gaohalli.
- (5) The Wassawa of Chikhli.
- (6) The Parvi of Nawalpur.

BENGAL.

The Western Dvars in the Jalpaiguri District.

The Districts of Jalpaiguri (except the Western Dvars) and Darjeeling.

The following portions of the Chota Nagpur Division, namely :—
the Districts of Hazaribagh, Lohardagal and Manbhum and Pargana
Dhalbhum in the District of Singbhum ;
the Kolham in the District of Singbhum ;
the Estate of Porahab, in the District of Singbhum.

The Mahal of Augul.

UNITED PROVINCES OF AGRA AND OUDH.

Kumaon and Gartwal.

Tarai District.

The Scheduled portion of the Mirzapur District.

Pargana Jaunsar Bawar, in the Dehra-Dun District.

PUNJAB.

The Scheduled Districts of the Punjab.

CENTRAL PROVINCES.

The Scheduled Districts of the Central Provinces.

COORG.

The Chief Commissionership of Coorg.

ANDAMAN AND NIKOBAR ISLANDS.

The Chief Commissionership of the Andaman and Nikobar Islands.

AJMERE AND MARWARA.

Ajmere and Marwara.

ASSAM.

The Chief Commissionership of Assam.

The Lushai Hills (formerly known as the North and South Lushai Hills) and Rutton Puiya's villages, including Demagiri, in the Chittagong Hill tracts.

BURMA.

The Hill Tracts of Arakan, in Lower Burma.

Upper Burma (except the Shan States).

CENTRAL INDIA AGENCY.

The Pargana of Manpur.

BRITISH BALUCHISTAN.

The Chief Commissionership of British Baluchistan.

LIST C.

EXECUTION OF DECREES OF COURTS IN NATIVE STATES BY COURTS IN
BRITISH INDIA UNDER SECTION 44, C.P. CODE.

COOCH BEHAR.

Civil and Revenue Courts.

[See Gazette of India, 1879, Pt. I, p. 149. The notification was issued under Act X of 1877, kept in force by Act XIV of 1882, and is now in force by Section 157 of the present C.P. Code.]

MYSORE.

Civil and Revenue Courts.

[See Gazette of India, 1881, Pt. I, p. 589. The notification is kept in force as above.]

TRAVANCORE.

High Court of the State.

Zilla Courts.

Courts of Munsiffs: Provided that the documents mentioned in O. 21, r. 6, C. P. Code, bear the counter-signature of the Judge of the Zilla Court to which the Court of the Munsiff is subordinate.

[See Gazette of India, 1885, Pt. I, p. 667. The notification is kept in force by S. 157, C.P. Code.]

COCHIN.

Appeal Court of the State.

Zilla Courts.

Courts of Munsiffs: Provided that the documents mentioned in O. 21, r. 6, C.P. Code, bear the counter-signature of the Judge of the Zilla Court to which the Court of the Munsiff is subordinate.

[See Gazette of India, 1885, Pt. I, p. 667. The notification is kept in force as above.]

PUDUKOTTAI.

Chief Court of the State, except the decrees of the Registrar of the Court.

[See Gazette of India, 1904, Pt. I, p. 917. The notification is kept in force as above.]

MAHI KANTHA.

Court of the Manager of Pithapur.

Court of the Manager of the Mohanpur Taluka.

Court of the Manager of the Khadal Taluka.

[See Gazette of India, 1909, Pt. I, p. 256.]

Court of the Manager of the Taluka of Ghodasar.

[See Gazette of India, 1913, Pt. I, p. 158.]

REWA KANTHA.

Huzur Court of Rajpipla.

Court of the Sar Nyayadhish of Rajpipla.

Sachin (Surat)—

Court of the Diwan of Sachin.

Court of the Judicial Commissioner of Sachin.

[See Gazette of India, 1910, Pt. I, p. 770.]

JANJIRA (KOLABA).

Court of the Sar Nyayadhish of Janjira.

KOLHAPUR.

The Court of His Highness the Maharaja of Kolhapur.

The Combined Court of the Resident, Kolhapur and Political Agent, Southern Mahratta Country States, and His Highness the Maharaja of Kolhapur.

The Court of the Chief Judge, Kolhapur.

The Court of the Sadar Amin, Kolhapur.

The Court of the Munsiff of Sirol.

The Court of the Munsiff of God Hingly.

The Court of the Joint Officer, Katkol.

The Court of the Jaghirdar of Kagal (Junior).

The Court of the Munsiff of Kagal (Junior).

The Court of the Jaghirdar of Bavda.

The Court of the Munsiff of Bavda.

The Court of the Jaghirdar of Iohalkaranji.

The Court of the Munsiff of Iohalkaranji.

The Court of the Munsiff of Agra.

The Court of the Jaghirdar of Vishalgad.

The Court of the Munsiff of Vishalgad.

The Court of the Munsiff of Karvir.

The Court of the Jaghirdar of Kagal (Senior).

The Court of the Munsiff of Kagal (Senior).

The Court of Himat Bahadur, Kolhapur.

The Court of the Munsiff of the Himat Bahadur Jaghir.

The Court of the Munsiff of Kapshi.

The Court of the Munsiff of Sallashkar Jaghir.

[See Gazette of India, 1912, Pt. I, p. 136.]

Southern Mahratta country.

Court of the Chief of Miraj (Senior).

Court of the Nyayadhish of Miraj (Senior)

Court of the Administrator of Miraj (Junior).

Court of the Munsiff of Kawtha (Junior).

Court of the Munsiff of Gadgiri (Junior).

Court of the Munsiff of Kuroli (Junior).

Court of the Sub-Saranjamdar of Mhysal.

The Huzur Court of Sangli.

The Nyayadhish Court of Sangli.

The Subordinate Judge's Court, Central Division (Miraj Prant Taluka including Sangli and the Terdal Taluka).

The Subordinate Judge's Court, Southern Division (including the Talukas of Shahapur and Shirhatti).

The Subordinate Judge's Court, Northern Division (including the Talukas of Kuchi and Mangal Wedhi).

[See Gazette of India, 1909, Pt. I, p. 21, for the last five kinds of Courts.]

AKALKOT (SHOLAPUR).

Court of Political Agent, Sholapur.

Court of the Subordinate Judge of Akalkot.

Subordinate Court of Pilio.

Subordinate Court of Kurla.

SURAT AGENCY.

Court of the Political Agent, Surat.

Court of the Assistant Political Agent for the Dangs.

SAVANTVADI.

Court of the Political Agent, Savantvadi.

Court of the Chief Judge, Savantvadi.

Court of the Nyayadhish of Savantvadi.

Court of the Munsiff of Kudal.

SAVANUR (DHARWAR).

Court of the Political Agent, Dharwar.

[See Gazette of India, 1906, Pt. I, p. 472, for Courts for which a special reference is not provided above.]

BARODA.

Civil Courts situate in the territories of His Highness the Gaekwar of Baroda.

[See Gazette of India, 1908, Pt. I, p. 591.]

BENARES STATE.

Chief Judge's Court, Ramnagar.

Collector's Court, Korh.

Collector's Court, Chakia.

Judge's Court, Korh.

Civil Judge's Court, Chakia.

Assistant Collector's Court, Korh.

Assistant Collector's Court, Chakia.

[See Gazette of India, 1911, Pt. I, p. 490.]

KASHMIR.

1. Courts of His Highness the Maharaja.

2. Court of the Judge, High Court.

3. Courts of Chief Judges, Jammu and Kashmir.

4. Courts of Sub-Judges, Jammu, Mirpur, Kotli, Udampur, Srinagar and Muzaffarabad.

5. Court of the Judge, Small Cause Court, Srinagar.

6. Courts of the Wazir Wazarat Leh and Gilgit.

[Government Notification No. 538—1-B, dated 14th April, 1916.]

LIST D.

COURTS WHICH HAVE BEEN ESTABLISHED OR CONTINUED BY THE GOVERNOR GENERAL IN COUNCIL.

All the Courts mentioned in List E, except the last mentioned Court in that list.

KATHIAWAR AGENCY.

The Courts of the Thanadars of Babra, Bloika, Chok Chotila, Dasada, Dhrafa Lakhapadar, Lodhika, Paliad, Sougadh and Wadhwan Districts.

PALANPUR AGENCY.

The Courts of the Thanadars of Deodar, Kanraj, Santalpur, Varabi and Wao.

REWA KANKA AGENCY.

The Courts of the Thanadars of Jambughoda, Pandu and Sankheda.

LIST E.

THE PROVISIONS OF SECTION 45, C. P. CODE ARE DECLARED TO APPLY TO THE COURTS SPECIFIED BELOW.

BALUCHISTAN AGENCY.

All Civil Courts in the territories administered by the Agent to the Governor-General in Baluchistan as such Agent.

BARODA AGENCY.

The District Court and the Court of Small Causes in the Cantonment of Baroda.

The District Courts and the Subordinate Civil Courts of the sections in the Baroda State of the—

Ahmedabad Perantij Railway.

Anand-Godhra Branch } of the Bombay, Baroda and Central
Baroda-Godhra Chord } India Railway.

Mehsana Viramgam Railway.

Petland-Cambay Railway.

Rajputana, Malwa Railway and Tapti Valley Railway.

CENTRAL INDIA AGENCY.

The District Courts and the Courts of Small Causes in the Cantonment of Mhow, Nimach, and Nowgong, the Indore Residency Bazaars and the Civil lines of Nowgong.

The District Court, the Civil Court and the Court of Small Causes in the Cantonment of Sehore.

The Court of the Assistant to the Resident at Gwalior at Guna.

The District Courts and the Courts of Small Causes of the section in Central India of the—

Bhopal Itarsi Railway.
 Bhopal Ujjain Railway.
 Bina—Guna—Baran Railway.
 Great Indian Peninsula Railway.
 Godhra—Ratlam—Nagda Railway.
 Nagda—Muttra Railway.
 Nagda—Ujjain Railway and
 Rajputana—Malwa Railway.

HYRDEABAD AGENCY.

The District Court and the Court of Small Causes in the Cantonments of Secunderabad and Aurangabad, the Hyderabad Residency Bazars, and the sections in the Hyderabad State of—

His Highness the Nizam's Guaranteed State Railway System,
 The South East main line of the Great Indian Peninsula
 Railway, and

The broad gauge North West line of the Madras and
 Southern Mahratta Railway.

The District Court and the Subordinate Civil Courts of the sections in the Hyderabad State of the—

Barsi Light Railway.

Dhond-Manmad Branch of the Great Indian Peninsula Railway and Metre gauge main line of the Madras and Southern Mahratta Railway.

KASHMIR AGENCY.

The Court of the Assistants to the Resident in Kashmir.

MYSORE AGENCY.

The District Court and the Court of Small Causes in the Civil and Military Station of Bangalore.

The District Court and the Court of Small Causes of the—

Hindupur Railway.

Kolar Goldfields Railway and the Madras and Southern Mahratta Railway—

(i) from Mysore to Bangalore, and

(ii) from Bangalore to the Mysore frontier near Kuppam.

The District Court and the Subordinate Civil Courts of the section of the Harihar Branch of the Madras and Southern Mahratta Railway in the Mysore State.

RAJPUTANA AGENCY.

The District Court and the Court of Small Causes in Alen, Anadri and Kharari.

The District Courts and the Court of Small Causes of the sections in Rajputana of the—

Baran—Kotah Railway.

Bina—Gunan—Baran Railway.

Great Indian Peninsula Railway.

Nagda—Muttra Railway and Rajputana—Malwa Railway, other than the Cawnpur—Aohnera section.

The District Courts and the Subordinate Civil Courts of the lengths in Rajputana of the—

Agra—Delhi Chord Railway, and the Cawnpur—Achnera section of the Rajputana—Malwa Railway.

[See Gazette of India, 1913, Pt. I, p. 386.]

DHARWAR AGENCY.

The District Court and the Subordinate Civil Courts of the section of the Madras and Southern Mahratta Railway in the Savanur State.

KAIRA AGENCY.

The District Court and the Subordinate Civil Courts of the section of the Petland—Cambay Railway in the Cambay State.

KATHIAWAR AGENCY.

The Courts of the Political Agents and of the Deputy Assistant Political Agents in the Gohilwar, Halar, Jhalawar and Sorath Prants.

The Court of Small Causes, Rajkot Civil Station.

The District Court and the Subordinate Civil Courts of the sections of the Bombay Baroda and Central India Railway in Kathiawar, of the Dhrangadhra Railway, of the Dhoraji—Borbandar section of the Gondal Borbandar Railway, and of the Jamagar, Jetalsar, Raykot and Morvi Railways, respectively.

KOLHAPUR AND SOUTHERN MAHRATTA COUNTRY AGENCY.

The Court of the Resident in Kolhapur and Political Agent for the Southern Mahratta Country States.

The Court of the Assistant Political Agent in the Southern Mahratta Country.

The District Courts and the Subordinate Civil Courts of the sections of the Barsi Light Railway, the Great Indian Peninsula Railway, the Kolhapur Railway, the Madras and Southern Mahratta Railway and the Sangli Railway, respectively in Kolhapur and the Southern Mahratta Country.

MAHI KANTHA AGENCY.

The Courts of the Political Agent, the Assistant Political Agent, the District Deputy Assistant Political Agent and the Huzur Deputy Assistant Political Agent in the Mahi Kantha.

PALANPUR AGENCY.

The Courts of the Political Agent, the Assistant Political Agent, the District Deputy Assistant Political Agent and the Huzur Deputy Assistant Political Agent in Palanpur.

The District Court and Subordinate Civil Court of the Palanpur—Deesa Railway, and of the section of the Rajputana—Malwa Railway in the Palanpur State.

REWA KANTHA AGENCY.

The Courts of the Political Agent, the Assistant Political Agent, the District Deputy Assistant Political Agent and the Huzur Deputy Assistant Political Agent in the Rewa Kantha.

The District Courts and the Subordinate Civil Courts of the sections of the Bombay, Baroda and Central India, Godhra—Lunavada, Godhra—Rutlam—Nagda and Rajpipla Railways in the Rewa Kantha.

SATARA AGENCY.

The District Court and the Subordinate Civil Courts of the sections of the Madras and Southern Mahratta Railway in the States of Aundh and Phaltan.

SAVANTVADI AGENCY.

The Court of the Political Agent in Savantvadi.

SUKKUR AGENCY.

The District Court and the Subordinate Civil Courts of the sections of the North-Western Railway in the Khairpur.

SURAT AGENCY.

The District Court and the Subordinate Civil Courts of the sections of the Billimora—Kalamba and Tapti Valley Railway in the Bansda and Sachin States.

[See Gazette of India, 1913, Pt. I, p. 388.]

MANIPUR.

The Court of the Political Agent at Manipur.

BERAR.

All Civil Courts in Berar.

[See Gazette of India, 1913, Pt. I, p. 390.]

SIKKIM.

Court of the Political Officer in Sikkim.

[See Gazette of India, 1913, Pt. I, p. 390.]

LIST F.

OFFICERS TO WHOM NOTICES OF ORDERS ATTACHING THE SALARY OR ALLOWANCES OF CERTAIN OFFICERS ARE TO BE SENT BY NOTIFICATIONS UNDER O. 21, R. 48 (1), C. P. CODE.

Department or office in which judgment-debtor is employed.	Officer to whom notice should be sent.
A Military Officer serving in any of the following Divisions of the Army— Peshawar, Rawalpindi, Lahore, Quetta, Mhow, Poona, Meerut, Lucknow, Secunderabad and Burma.	The Deputy Controller of Military Accounts of the Division.

[See Gazette of India, 1910, Pt. J, p. 136.]

Employees of the Commercial Intelligence Department.	Comptroller, India Treasuries.
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[See Gazette of India, 1910, Pt. I, p. 321.]

Employees of the Indian Telegraph Department and of the Post Office of India.	Accountant General, Post Office and Telegraphs.
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[See Gazette of India, 1910, Pt. I, p. 365.]

Persons employed in the High Court of Calcutta, in the Home Department of the Government of India and in offices Subordinate to the Home Department.

Part I.—Gazetted Officers.

High Court, Calcutta, Home Department, Officers of Administrator-General, Bengal, Criminal Intelligence Department, Director General, Indian Medical Service, Office of the Private Secretary to His Excellency the Viceroy.	Accountant General, Bengal, Comptroller, India Treasuries, Calcutta.
X-Ray Institute ...	Treasury Officer, Dabra Dun.
Offices in Port Blair ...	Treasury Officer, Port Blair.

Part II.—Non-Gazetted Officers.

High Court, Calcutta ...	Registrar, High Court, Appellate or Original side, according as the judgment-debtor is employed in the Appellate or Original side.
Home Department ...	Registrar, Home Department ^{Calcutta} _{Simla} .

Part II.—Non-Gazetted Officers.

Office of Administrator General, Bengal.	Administrator-General, Bengal.
Criminal Intelligence Department...	Director, Criminal Intelligence, Simla.
Office of the Director-General, Indian Medical Service.	Secretary to the Director-General, Indian Medical Service, Simla.
X-Ray Institute ...	Superintendent, X-Ray Institute, Dehra Dun.
Offices in Port Blair ...	Superintendent of Port Blair.
Office of Private Secretary to His Excellency the Viceroy.	Registrar, Office of the Private Secretary to His Excellency the Viceroy ^{Calcutta} _{Simla} .

[See Gazette of India, 1910, Pt. I, p. 1159.]

Persons employed in the Legislative Department.

Gazetted Officers ...	Comptroller, India Treasuries, Calcutta.
Non-Gazetted Officers ...	Registrar, Legislative Department, ^{Calcutta} _{Simla} .

[See Gazette of India, 1910, Pt. I, p. 1174.]

Persons employed in the Department of Commerce and Industry of the Government of India and in offices subordinate to the Department of Commerce and Industry.

Part I.—Gazetted Officers.

Department of Commerce and Industry.	Comptroller, India Treasuries.
Office of the Director-General of the Post Office of India.	} Accountant General, Post Office and Telegraph.
Office of the Director-General of Telegraphs.	
Office of the Inspector-General of Excise and Salt.	}
Office of the Director, Central Excise Laboratory, Kasauli.	
Northern India Salt Revenue Department.	
Geological Survey of India ...	
Secretary to the Trustees, Indian Museum.	} Comptroller, India Treasuries.
Department of Mines ...	
Commercial Intelligence Department.	
Department of Explosives ...	
Printing and Stationery Department.	

Part II.—Non-Gazetted Officers.

Department of Commerce and Industry.	Registrar, Department of Commerce and Industry, ^{Calcutta} _{Simla} .
Post Office of India ...	Accountant General, Post Office and Telegraphs.
Indian Telegraph Department ...	Accountant General, Post Office and Telegraphs.
Office of the Inspector-General of Excise and Salt.	Inspector-General of Excise and Salt.
Office of the Director, Central Excise Laboratory, Kasauli.	Director, Central Excise Laboratory, Kasauli.
Northern India Salt Revenue Department.	Commissioner, Northern India Salt Revenue.
Geological Survey Department ...	Director, Geological Survey of India.
Indian Museum, Zoological Section and Art Section.	Officers in charge of the Sections.
Department of Mines ...	Chief Inspector of Mines in India.
Commercial Intelligence Department.	Director-General of Commercial Intelligence.
Department of Explosives ...	Chief Inspector of Explosives with the Government of India.
Printing and Stationery Department.	Controller of Printing, Stationery and Stamps.

[See Gazette of India, 1910, Pt. I, p. 1208.]

Persons employed in the Department of Education of the Government of India and in offices subordinate to that Department.

Part I.—Gazetted Officers.

Office of Presidency Senior Chaplain, Church of Scotland, Bengal.	Accountant General, Bengal.
Department of Education, Offices of Census Commissioner for India, Director-General of Archaeology, Lord Bishop's Chaplain, Calcutta, Archdeacon of Calcutta, Registrar of the Diocese, Calcutta, Sanitary Commissioner with the Government of India, Imperial Library, Imperial Record Department, Board of Examiners and Indian Museum.	Comptroller, Indian Treasuries, Calcutta.
Central Research Institute ...	Treasury Officer, Kasauli.

Part II.—Non-Gazetted Officers.

Department of Education	...	Registrar, Department of Education, <u>Calcutta</u> Simla.
Office of Census Commissioner for India.		Census Commissioner for India, Simla.
Office of the Director-General of Archaeology		Director-General of Archaeology, Simla.
Office of Lord Bishop's Chaplain, Calcutta.		Bishop's Chaplain, Calcutta.
Office of Presidency Senior Chaplain, Church of Scotland, Bengal.		Presidency Senior Chaplain, Church of Scotland, Bengal, Calcutta.
Office of Archdeacon of Calcutta	...	Archdeacon of Calcutta, Calcutta.
Office of Registrar of the Diocese of Calcutta.		Registrar of the Diocese of Calcutta, Calcutta.
Office of Sanitary Commissioner with the Government of India.		Sanitary Commissioner with the Government of India, Simla.
Central Research Institute	...	Director, Central Research Institute, Kasauli.
Imperial Library	...	Librarian, Imperial Library, Calcutta.
Imperial Record Department	...	Officer in charge of the Records of the Government of India, Calcutta.
Office of Board of Examiners	...	Secretary to the Board of Examiners, Calcutta.
Indian Museum	...	Secretary to the Trustees, Indian Museum, Calcutta.

[See Gazette of India, 1911, Pt. I, p. 26.]

Persons employed under the Railway Board and in Railway Offices subject to the Administrator General of the Railway Board.

Railway Department (Railway Board).		
Gazetted Officers	...	Comptroller, India Treasuries, Calcutta.
Non-Gazetted Officers	...	Registrar, Railway Department (Railway Board), <u>Calcutta</u> Simla.
State Railways worked by, or being constructed by, the State.		Examiner of Accounts of the Railway concerned except when the Examiner of Accounts is personally concerned, in which case the Accountant General, Railways, is the appointed officer.
Office of the State Railway Coal Superintendent.		Examiner of Accounts, Eastern Bengal State Railway.

Office of Superintendent, Local Manufacturers, Bombay.	Government Examiner of Railway Accounts, Bombay.
North-Western Railway Collieries.	Examiner of Accounts, North-Western Railway.
State lines worked by companies and Companies lines.	Chief Auditor of the Railway concerned.
Office of Senior Government Inspector, Circle No. I, Calcutta.	Government Examiner of Railway Accounts, Calcutta. -
Office of Junior Government Inspector, Rangoon.	Government Examiner of Accounts, Burma Railways, Rangoon.
Office of Senior Government Inspector, Circle No. II, Calcutta.	Government Examiner of Railway Accounts, Calcutta.
Office of Junior Government Inspector, Circle No. II, Calcutta.	Do.
Office of Senior Government Inspector, Circle No. III, Lucknow.	Examiner of Accounts, Oudh and Rohilkhand Railway, Lucknow.
Office of Junior Government Inspector, Circle No. III, Gorakhpur.	Government Examiner of Accounts, Bengal and North-Western Railway, Gorakhpur.
Office of Senior Government Inspector, Circle No. IV, Lahore.	Examiner of Accounts, North-Western Railway, Lahore.
Office of Senior Government Inspector, Circle No. V, Bombay.	Government Examiner of Railway Accounts, Bombay.
Office of Senior Government Inspector, Circle No. VI, Bombay.	Do.
Office of Senior Government Examiner, Circle No. VII, Madras.	Government Examiner of Railway Accounts, Madras.
Office of Government Examiner of Railway Accounts.	The Government Examiner concerned, except when he is himself personally concerned, in which case the Accountant-General, Railways, is the appointed officer.

[See Gazette of India, 1911, Pt. I, p. 57.]

Persons employed in the Finance Department of the Government of India and in Offices subordinate to it.

Part I.—Gazetted Officers.

Finance Department: Offices of the Comptroller and Auditor General, the Head Commissioner of Paper Currency and the Mint and Assay Masters, Calcutta.	Comptroller, India Treasuries, Calcutta.
Offices of the Mint and Assay Masters, Bombay.	Accountant-General, Bombay.
Office of the Accountant-General and Commissioner of Paper Currency, Madras.	* Accountant General and Commissioner of Paper Currency, Madras.

* Except where the head of the Office is himself concerned, in which case the Comptroller General, Calcutta, is the appointed Officer.

Part I.—Gazetted Officers.

Office of the Accountant-General and Commissioner of Paper Currency, Bombay.	* Accountant General and Commissioner of Paper Currency, Bombay.
Office of the Accountant-General, Bengal.	* Accountant-General, Bengal.
Office of the Accountant-General, United Provinces.	* Accountant-General, United Provinces.
Office of the Accountant-General and Commissioner of Paper Currency, Punjab.	* Accountant-General and Commissioner of Paper Currency, Punjab, Lahore.
Office of the Accountant-General and Commissioner of Paper Currency, Burma.	* Accountant-General and Commissioner of Paper Currency, Burma, Rangoon.
Office of the Accountant-General, Post Office and Telegraphs.	* Accountant General, Post Office and Telegraphs, Calcutta.
Office of the Comptroller, India Treasuries.	* Comptroller, India Treasuries, Calcutta.
Office of the Comptroller, Central Provinces.	* Controller, Central Provinces, Nagpur.
Office of the Comptroller, Examiner of Accounts, Military Works Service.	* Examiner of Accounts. Military Works Service, Simla.
Office of the Accountant-General, Railways.	Comptroller, India Treasuries.
Office of the Examiner of Accounts, North-Western Railway.	* Examiner of Accounts, North-Western Railway.
Office of the Examiner of Accounts, Eastern Bengal Railway.	* Examiner of Accounts, Eastern Bengal Railway.
Office of the Examiner of Accounts, Oudh and Rohilkhand Railway.	* Examiner of Accounts, Oudh and Rohilkhand Railway.
Office of the Examiner of Accounts, Lower Ganges Bridge Project.	* Examiner of Accounts, Lower Ganges Bridge Project.
Office of the Government Examiner of Railway Accounts, Madras.	* Government Examiner, Railway Accounts, Madras.
Office of the Government Examiner of Railway Accounts, Bombay.	* Government Examiner, Railway Accounts, Bombay.
Office of the Government Examiner of Railway Accounts, Calcutta.	* Government Examiner Railway Accounts, Calcutta.
Office of the Government Examiner of Railway Accounts, Rohilkhand and Kumaon Railway Company.	* Government Examiner Railway Accounts, Rohilkhand and Kumaon Railway Company.
Office of the Government Examiner of Railway Accounts, Bengal and North-Western Railway.	* Government Examiner, Railway Accounts, Bengal and North-Western Railway.

*Except where the head of the Office is himself concerned, in which case the Comptroller General, Calcutta, is the appointed Officer.

Part I.—Gazetted Officers.

Office of the Government Examiner of Railway Accounts, Assam-Bengal Railway.	* Government Examiner, Railway Accounts, Assam-Bengal Railway.
Office of the Government Examiner of Railway Accounts, Burma Railways.	* Government Examiner, Railway Accounts, Burma Railways.

Part II.—Non-Gazetted Officers.

Finance Department.	Registrar, Finance Department, Calcutta Simla
Office of the Comptroller and Auditor General.	Comptroller and Auditor General, Calcutta.
„ Head Commissioner of Paper Currency.	Assistant Comptroller General in charge, Paper Currency, Calcutta.
„ Mint Officer, Calcutta.	Mint Master, Calcutta.
„ Assay Master, Calcutta.	Assay Master, Calcutta.
„ Mint Master, Bombay.	Mint Master, Bombay.
„ Assay Master, Bombay.	Assay Master, Bombay.
„ Accountant-General and Commissioner of Paper Currency, Madras.	Accountant-General and Commissioner of Paper Currency, Madras.
„ Accountant-General and Commissioner of Paper Currency, Bombay.	Accountant-General and Commissioner of Paper Currency, Bombay.
„ Accountant-General, Bengal.	Accountant-General, Bengal.
„ Accountant-General, United Provinces.	Accountant-General, United Provinces.
„ Accountant-General and Commissioner of Paper Currency, Punjab.	Accountant-General and Commissioner of Paper Currency, Punjab.
„ Accountant-General and Commissioner of Paper Currency, Burma.	Accountant-General and Commissioner of Paper Currency, Burma.
„ Accountant-General of Post Office and Telegraphs.	Accountant-General, Post Office and Telegraphs.

* Except where the head of the Office is himself concerned, in which case the Accountant General Railways is the appointed Officer.

Part II.—Non-Gazetted Officers.

Office of the Comptroller, India Treasuries.	Comptroller. India Treasuries, Calcutta.
" Comptroller Central Provinces.	Comptroller of India Treasuries, Central Provinces.
" Examiner of Accounts, Military Works Services.	Examiner of Accounts, Military Works Services, Simla.
Currency Office, Karachi.	Deputy Commissioner of Paper Currency, Karachi.
Currency Office, Cawnpore.	Assistant Accountant General in charge, Paper Currency, Cawnpore.
Office of the Accountant-General, Railways.	Accountant General, Railways.
" Examiner of Accounts, N. W. Railway.	Examiner of Accounts, North Western Railway.
" Examiner of Accounts, Eastern Bengal Railway.	Examiner of Accounts, Eastern Bengal Railway.
" Examiner of Accounts, Oudh and Rohilkhand Railway.	Examiner of Accounts, Oudh and Rohilkhand Railway.
" Examiner of Accounts Lower Ganges Bridge Project.	Examiner of Accounts, Lower Ganges Bridge Project.
" Government Examiner of Railway Accounts, Madras.	Government Examiner of Railway Accounts, Madras.
" Government Examiner of Railway Accounts, Bombay.	Government Examiner of Railway Accounts, Bombay.
" Government Examiner of Railway Accounts, Calcutta.	Government Examiner of Railway Accounts, Calcutta.
" Government Examiner of Railway Accounts, Rohilkhand and Kumaon Railway Company.	Government Examiner of Railway Accounts, Rohilkhand and Kumaon Railway Company.
" Government Examiner of Railway Accounts, Bengal and N. W. Railway.	Government Examiner of Railway Accounts, Bengal and North Western Railway.
" Government Examiner of Railway Accounts, Assam Bengal Railway.	Government Examiner of Railway Accounts, Assam Bengal Railway.
" Government Examiner of Railway Accounts, Burma Railways.	Government Examiner of Railway Accounts, Burma Railways.

[See Gazette of India, 1911, Pt. I, p. 126.]

Persons employed in the Department of Revenue and Agriculture of the Government of India and in the Department under the Administrative Control of the Department of Revenue and Agriculture.

Part I.—Gazetted Officers.

	Comptroller, Calcutta.	India	Treasuries,
1. Department of Revenue and Agriculture, Government of India, including the Office of the Inspector-General of Forests to the Government of India.			
2. Forest Research Institute and College, Dehra Dun.		"	
3. Survey of India Department.		"	
4. Imperial Meteorological Department, Simla.		"	
5. Office of the Director, Colaba and Alibag Observatories, Bombay, and of the Director, Kodai-kanal and Madras Observatories.		"	
6. Imperial Agricultural Department including the Offices of the Inspector-General of Agriculture in India, Pusa and the Imperial Cotton Specialist, Poona.		"	
7. Agricultural Research Institute and College, Pusa.		"	
8. Office of the Inspector-General, Civil Veterinary Department, Simla.		"	
9. Imperial Bacteriological Laboratory, Muktesar.		"	
10. Government Cattle Farm, Hissar.		"	
11. Civil Veterinary Department, Sind, Baluchistan and Rajputana.		"	
12. Office of the Veterinary Officer investigating Camel Diseases, Lahore.		"	
13. Botanical Survey of India, including Reporter on Economic Products and the Indian Museum, Industrial Section.		"	

Part II.—Non-Gazetted Officers.

1. Department of Revenue and Agriculture, Government of India, including the office of the Inspector-General of Forests.	Registrar, Department of Revenue and Agriculture, Government of India, <u>Calcutta</u> , Simla
2. Office of the President, Forest Research Institute and College.	President, Forest Research Institute and College, Dehra Dun.
3. Office of Imperial Sylviculturist.	Imperial Sylviculturist, Dehra Dun.
4. " " Forest Botanist.	" Forest Botanist "
5. " " Economist.	" Economist "
6. " " Zoologist.	" Zoologist "
7. " " Chemist.	" Chemist "
8. Survey of India Department, (Trigonometrical Surveys).	Superintendent, Trigonometrical Surveys, Dehra Dun.
9. Survey of India Department, (Northern Circle).	Superintendent, Northern Circle, Survey of India Department, Mussoorie.
10. Survey of India Department, (Southern Circle).	Superintendent, Southern Circle Survey of India Department, Bangalore.
11. Survey of India Department, (Eastern Circle.)	Superintendent, Eastern Circle.
12. Survey of India Department, (Office of Superintendent, Map Publication).	Survey of India Department, Shillong.
13. Survey of India Department, (Photo Litho Office.)	Superintendent, Map Publication, Survey of India Department, Calcutta.
14. Survey of India Department, (Engraving and Drawing offices.)	
15. Survey of India Department, (Map Record and Issue office).	
16. Survey of India Department, (Mathematical Instrument office).	Officer in charge, Mathematical Instrument office, Survey of India Department, Calcutta.
17. Survey of India Department (Simla Drawing office).	Officer in charge, Simla Drawing office, Simla.
18. Survey of India Department (Survey or General's office).	Registrar, Surveyor General's office, Calcutta.

FOOT-NOTE :—Entries Nos. 8 to 18 in Part II of the above list include the following classes of establishments :—

Sub-Assistant Superintendents, Old Provincial Service, Sub-Assistant Superintendents, Upper Subordinate Service, Ministerial Establishment (clerks, printers, engravers, photographers, artificers, etc.) ; and Lower Subordinate Service (Surveyors, writers, computers, draftsmen & etc.

Part II.—Non-Gazetted Officers.

19. Meteorological office, Simla.	Director General of Observatories, Simla.
20. Meteorological office, Madras.	Meteorologist, Madras.
21. Meteorological office, Bombay.	„ Bombay.
22. Meteorological office, Calcutta.	„ Calcutta.
23. Meteorological office, Allahabad.	„ Allahabad.
24. Office of the Director Colaba and Alibag Observatories.	Director, Colaba and Alibag Observatories, Bombay (Colaba).
25. Office of the Director, Kodaikanal and Madras Observatories.	Director, Kodaikanal and Madras Observatories, Kodaikanal.
26. Meteorological Department (whole time observers other than those employed in Nos. 19 to 25 above).	Director General of Observatories, Simla.
27. Office of the Inspector-General of Agriculture in India.	Inspector-General of Agriculture in India, Pusa, Bengal.
28. Office of the Imperial Cotton Specialist, Poona.	Imperial Cotton Specialist, Poona.
29. Agricultural Research Institute and College, Pusa.	Director, Agricultural Research Institute and College, Pusa, Bengal.
30. Office of the Inspector-General, Civil Veterinary Department.	Personal Assistant to the Inspector-General, Civil Veterinary Department, Simla.
31. Imperial Bacteriological Laboratory, Muktesar.	Imperial Bacteriologist, Muktesar, District Naini Tal, United Provinces.
32. Government Cattle Farm, Hissar.	Superintendent, Government Cattle Farm, Hissar.
33. Civil Veterinary Department, Sind, Baluchistan and Rajputana.	Superintendent, Civil Veterinary Department, Sind, Baluchistan and Rajputana, Karachi, Sind.
34. Office of the Veterinary Officer investigating Camel Diseases.	Veterinary Officer investigating Camel Diseases, Lahore.
35. Botanical Survey of India, including assistants for systematic work, the Reporter on Economic Products, and the Indian Museum, Industrial Section.	Director, Botanical Survey of India, Sibpur, Howrah.
36. Office of the Board of Scientific Advice.	Secretary, Board of Scientific Advice, Royal Botanic Gardens, Sibpur, Howrah.

[See Gazette of India, 1911, Pt. I, p. 217.]

Persons employed under the orders of the Military Secretary to His Excellency the Viceroy.

Part I.—Gazetted Officers.

Military Secretary and Aides-de-Camp to the Viceroy.	Deputy Controller, Military Accounts, 8th (Lucknow) Division.
Surgeon to the Viceroy	} Comptroller, India Treasuries.
Comptroller, Viceroy's Household ...	
Personal Assistant to the Military Secretary to the Viceroy.	
Assistant Surgeon to the Viceroy ...	} Accountant-General, Public Works, Bengal.
Superintendent, Viceregal Estates, Simla Sub-division.	
Commandant and Adjutant, Viceroy's Body-Guard.	Deputy Comptroller, 7th (Meerut) Division.

Part II.—Non-Gazetted Officers.

Superintendent, Viceregal Estates, Calcutta Sub-division.	Deputy Accountant-General, Public Works, Bengal.
Superintendent, Viceregal Gardens, Simla.	Military Secretary to the Viceroy.
Foreman Engineer, Viceregal Estates, Simla.	Superintendent, Viceregal Estates, Simla.
Office of the Military Secretary to the Viceroy.	Personal Assistant to the Military Secretary to the Viceroy.
Office of the Superintendent, Viceregal Estates, Calcutta.	Superintendent, Viceregal Estates, Calcutta.
Director of Music and Establishment of His Excellency the Viceroy's Band.	Military Secretary to the Viceroy.

[See Gazette of India, 1911, Pt. I, p. 361.]

Persons employed in the Finance Department (Military Finance), and in the offices subordinate to the Government of India in that Department.

Part I.—Gazetted Officers.

Finance Department, (Military Finance).	Comptroller, India Treasuries, Calcutta.
Office of the Military Accountant General.	Deputy Controller of Military Accounts, 8th (Lucknow) Division, Lucknow.
Office of the Controller of Military Accounts, Northern Circle.	Deputy Controller of Military Accounts, 2nd (Rawalpindi) Division, Rawalpindi.

Part I.—Gazetted Officers.

Office of the Deputy Controller of Military Accounts, 1st (Peshawar) Division.	}	Deputy Controller of Military Accounts, 1st (Peshawar) Division, Peshawar.
Office of the Divisional Disbursing Officer, 1st (Peshawar) Division.		
Office of the Deputy Controller of Military Accounts, 2nd (Rawalpindi) Division.	}	Deputy Controller of Military Accounts, 2nd (Rawalpindi) Division, Rawalpindi.
Office of the Divisional Disbursing Officer, 2nd (Rawalpindi) Division.		
Office of the Deputy Controller of Military Accounts, 3rd (Lahore) Division.	}	Deputy Controller of Military Accounts, 3rd (Lahore) Division, Lahore.
Office of the Divisional Disbursing Officer, 3rd (Lahore) Division.		
Office of the Controller of Military Accounts, Western Circle.		Deputy Controller of Military Accounts, 6th (Poona) Division, Poona.
Office of the Deputy Controller of Military Accounts, 4th (Quetta) Division.	}	Deputy Controller of Military Accounts, 4th (Quetta) Division, Quetta.
Office of the Divisional Disbursing Officer, 4th (Quetta) Division.		
Office of the Deputy Controller of Military Accounts, 5th (Mhow) Division.	}	Deputy Controller of Military Accounts, 5th (Mhow) Division, Mhow.
Office of the Divisional Disbursing Officer, 5th (Mhow) Division.		
Office of the Deputy Controller of Military Accounts, 6th (Poona) Division.	}	Deputy Controller of Military Accounts, 6th (Poona) Division, Poona.
Office of the Divisional Disbursing Officer, 6th (Poona) Division.		
Office of the Controller of Military Accounts, Eastern Circle.		Deputy Controller of Military Accounts, 8th (Lucknow) Division, Lucknow.
Office of the Deputy Controller of Military Accounts, 7th (Meerut) Division.	}	Deputy Controller of Military Accounts, 8th (Meerut) Division, Meerut.
Office of the Divisional Disbursing Officer, 7th (Meerut) Division.		

Part I.—Gazetted Officers.

Office of the Deputy Controller of Military Accounts, 8th (Lucknow) Division.	}	Deputy Controller of Military Accounts, 8th (Lucknow) Division, Lucknow.
Office of the Divisional Disbursing Officer, 8th (Lucknow) Division.		
Office of the Deputy Controller of Military Accounts, 9th (Secunderabad) Division.	}	Deputy Controller of Military Accounts, 9th (Secunderabad) Division, Bolarum.
Office of the Divisional Disbursing Officer, 9th (Secunderabad) Division.		
Office of the Deputy Controller of Military Accounts in Independent charge, Burma Division.	}	Examiner of Military Accounts, Burma Division, Maymyo.
Office of the Divisional Disbursing officer, Burma Division.		
Office of the Controller of Military Supply Accounts.		Controller of Military Supply Accounts, Calcutta.
Office of the Chief Accountant, Bombay Dockyard.	}	Controller of Marine Accounts, Calcutta.
Office of the Accountant, Kidderpore Dockyard.		

Part II.—Non-Gazetted Officers.

Finance Department (Military Finance).	Registrar, Finance Department (Military Finance), Simla.
Office of the Military Accountant-General.	Military Accountant-General, Simla.
Office of the Controller of Military Accounts, Northern Circle.	Controller of Military Accounts, Northern Circle, Rawalpindi.
Office of the Deputy Controller of Military Accounts, 1st (Peshawar) Division.	Deputy Controller of Military Accounts, 1st (Peshawar) Division, Peshawar.
Office of the Deputy Controller of Military Accounts, 2nd (Rawalpindi) Division.	Deputy Controller of Military Accounts, 2nd (Rawalpindi) Division, Rawalpindi.
Office of the Deputy Controller of Military Accounts, 3rd (Lahore) Division.	Deputy Controller of Military Accounts, 3rd (Lahore) Division, Lahore.
Office of the Divisional Disbursing Officer, 1st (Peshawar) Division.	Divisional Disbursing Officer, 1st (Peshawar) Division, Peshawar.
Office of the Divisional Disbursing Officer, 2nd (Rawalpindi) Division.	Divisional Disbursing Officer, 2nd (Rawalpindi) Division, Rawalpindi.

Part II.—Non-Gazetted Officers.

Office of the Divisional Disbursing Officer, 3rd (Lahore) Division.	Divisional Disbursing Officer, 3rd (Lahore) Division, Lahore.
Office of the Controller of Military Accounts, Western Circle.	Controller of Military Accounts, Western Circle, Poona.
Office of the Deputy Controller of Military Accounts, 4th (Quetta) Division.	Deputy Controller of Military Accounts, 4th (Quetta) Division, Quetta.
Office of the Deputy Controller of Military Accounts, 5th (Mhow) Division.	Deputy Controller of Military Accounts, 5th (Mhow) Division, Mhow.
Office of the Deputy Controller of Military Accounts, 6th (Poona) Division.	Deputy Controller of Military Accounts, 6th (Poona) Division, Poona.
Office of the Divisional Disbursing Officer, 4th (Quetta) Division.	Divisional Disbursing Officer, 4th (Quetta) Division, Quetta.
Office of the Divisional Disbursing Officer, 5th (Mhow) Division.	Divisional Disbursing Officer, 5th (Mhow) Division, Mhow.
Office of the Divisional Disbursing Officer, 6th (Poona) Division.	Divisional Disbursing Officer, 6th (Poona) Division, Poona.
Office of the Controller of Military Accounts, Eastern Circle.	Controller of Military Accounts, Eastern Circle, Lucknow.
Office of the Deputy Controller of Military Accounts, 7th (Meerut) Division.	Deputy Controller of Military Accounts, 7th (Meerut) Division, Meerut.
Office of the Deputy Controller of Military Accounts, 8th (Lucknow) Division.	Deputy Controller of Military Accounts, 8th (Lucknow) Division, Lucknow.
Office of the Divisional Disbursing Officer, 7th (Meerut) Division.	Divisional Disbursing Officer, 7th (Meerut) Division, Meerut.
Office of the Divisional Disbursing Officer, 8th (Lucknow) Division.	Divisional Disbursing Officer, 8th (Lucknow) Division, Lucknow.
Office of the Deputy Controller of Military Accounts in Independent Charge, 9th (Secunderabad) Division.	Deputy Controller of Military Accounts in Independent Charge, 9th (Secunderabad) Division, Bolarum.
Office of the Divisional Disbursing Officer, 9th (Secunderabad) Division.	
Office of the Deputy Controller of Military Accounts in Independent Charge, Burma Division.	Deputy Controller of Military Accounts in Independent Charge, Burma Division, Maymyo.
Office of the Divisional Disbursing Officer, Burma Division.	Divisional Disbursing Officer, Burma Division, Maymyo.
Office of the Controller of Military Supply Accounts.	Controller of Military Supply Accounts, Calcutta.
Office of the Chief Accountant, Bombay Dockyard.	Chief Accountant, Bombay Dockyard, Bombay.
Office of the Accountant, Kidderpore Dockyard.	Accountant, Kidderpore Dockyard, Calcutta.

[See Gazette of India, 1911, Pt. I, p. 461.]

Persons employed in the Offices of the Accountant-General, Bihar and Orissa and the Comptroller, Assam.

Part I.—Gazetted Officers.

Office of the Accountant-General, Bihar and Orissa.	* Accountant-General, Bihar and Orissa, Ranchi.
Office of the Comptroller, Assam...	* Comptroller, Assam, Shillong.

Part II.—Non-Gazetted Officers.

Office of the Accountant-General, Bihar and Orissa.	Accountant-General, Bihar and Orissa, Ranchi.
Office of the Comptroller, Assam ...	Comptroller, Assam, Shillong.

[See Gazette of India, 1913, Pt. I, p. 647.]

* Except where the head of the office is himself concerned, in which case the Comptroller-General, Delhi, is the appointed Officer.

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